No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EDDIE HARLAUX, ROLAND HARLAUX, LEON HARLAUX, LIONEL HARLAUX, CECIL HARLAUX and STELLA HARLAUX MANCHESTER

V.

LEROY HARLAUX

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

1.

Under the Fourteenth Amendment of the United States Constitution, *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 1459 (1977), and related cases defining the rights of illegitimates, can Louisiana deny all inheritance rights to a class of persons whose only distinguishing characteristics are that:

(1) they are illegitimate; and

(2) their ancestor died before a specified but arbitrary date, i.e., the effective date of the Louisiana Constitution?

2.

Can Louisiana take this action when the rights that that class of persons is claiming are based on *both* the United States and the Louisiana Constitutions?

3.

Can Louisiana take this action even though the Louisiana Supreme Court specifically held that all three criteria layed down in *Chevron Oil Company vs. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 Led.2d 296 (1971) were met and thus the decision in *Succession of Brown*, 388 So.2d 1151 (La., 1980) warranted retroactive application?

4.

Does Louisiana have legitimate State interests that are sufficiently important to justify the denial of all rights to illegitimates before 1975?

a) Does Louisiana's Constitutional provision in Article 1 Section 5 require that the rights of illegitimates prior to 1975 be sacrificed to preserve the rights of forced heirship under Article 12 Section 5?

b) Is Article 12 Section 5 supported by legitimate State interests that are important enough to justify the denial of all rights to illegitimates prior to 1975?

c) Is Article 12 Section 5 as applied a violation of the Fourteenth Amendment to the United States Constitution?

5.

Can Louisiana flatly deny succession rights to all illegitimates without consideration of the specific factual context of the parties including their ability to trace their ancestry in filiation, their ability to account for succession property and proceeds? Can it do so when none of the succession property has been transferred out of the family to any third party transferee?

6.

Does Louisiana have legitimate state interests that are sufficient to justify the creation of an arbitrary discrimination between classes of illegitimates before and after January 1,1975?

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The petitioners, Eddie Harlaux, Roland Harlaux, Leon Harlaux, Lionel Harlaux, Cecil Harlaux and Stella Harlaux Manchester respectfully pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Louisiana entered on February 11, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana (Appendix A. p. A-3) is reported at 426 So.2d 602 (La., 1983). The ponion of the Court of Appeal, First Circuit, State of Louisiana is reported at 411 So.2d 581 (La. App. 1st Cir., 1982) (Appendix A. p. A-11)

JURISDICTION

The Louisiana Supreme Court denied rehearing on February 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Louisiana

Article I § 3

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

Article 12 § 5

No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law. Trusts may be authorized by law, and a forced portion may be placed in trust.

Civil Code of the State of Louisiana
Article 209

A. A child not entitled to legitimate filiation nor fili-

ated by the initiative of the parent by legitimation or by acknowledgement under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

C. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

D. The right to bring this proceeding is heritable.

Amended by Acts 1980, No. 549, § 1; Arts 1981, No. 720, §1; Acts 1982, No. 527, § 1.

Article 919 (repealed)

Illegitimate children are called to the inheritance of their father, who has duly acknowledged them, when he has left no descendants or ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the state.

In all other cases, they can only bring an action against their father or his heirs for alimony, the amount of which shall be determined, as is directed in the Title: *Of Father and Child.*

La. R.S. 9:5630

A. An action by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, to assert an interest in an immovable formerly owned by the deceased, against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, is prescribed in two years from the date of the finality of the judgment of possession.

B. This Section establishes an acquisitive prescription, and shall be applied both retrospectively and prospectively; however, any person whose rights would be adversely affected by this Section shall have one year from September 11, 1981 within which to assert the action described in Subsection A of this Section and if no such action is instituted within that time, such claim shall be forever barred.

C. "Third person" means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession.

Act 549 of 1980

ILLEGITIMATE CHILDREN—PROOF OF FILIATION

ACT NO. 549

SENATE BILL NO. 1060

An Act to amend and reenact Articles 208 and 209 of the Louisiana Civil Code and repeal Articles 210 and 212 of the Louisiana Civil Code to provide for proof of filiation by illegitimate children, or presumption of filiation on their

behalf; to provide a procedure and time limitations for proceedings to establish filiation; to provide for the method and standard of proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons in the successions of their alleged parents; and to provide otherwise with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Articles 208 and 209 of the Louisiana Civil Code are hereby amended and reenacted to read as follows:

Art. 208. Authorization to prove filiation. Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation.

Art. 209. Methods of proving filiation. 1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this Article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.

2. A child who is shown to be the child of a woman on an original certificate of birth is presumed to be the child of that woman, though the contrary may be shown by a preponderance of the evidence.

3. An illegitimate child not shown as the child of a woman on an original certificate of birth may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the illegitimate child of that woman.

4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

5. Proof of filiation must be made by evidence of events, conduct, or other information which occurred during the lifetime of the alleged parent. A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, unless there is a presumption of filiation as set forth in Section 2 above. If no proceeding is timely instituted, the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts.

Section 2. Articles 210 and 212 of the Louisiana Civil Code are hereby repealed.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Louisiana Constitution of 1974.

Section 4. Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under

the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred.

Approved July 23, 1980.

Act 720 of 1981

CHILDREN—PROOF OF FILIATION

ACT NO. 720

HOUSE BILL NO. 818

(On recommendation of the Louisiana State Law Institute)

An Act to amend and reenact Articles 208 and 209 of the Louisiana Civil Code and to amend and reenact Subsection F of Section 236.1 of Title 46 of the Louisiana Revised Statutes of 1950 to provide for proof of filiation by children, or on their behalf; to provide a procedure and time limitations for proceedings to establish filiation; to provide for the method and standard of proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons to establish filiation to their alleged parents; to authorize the Department of Health and Human Resources to institute proceedings to establish filiation under the Child Support Enforcement Program; and to provide otherwise with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Articles 208 and 209 of the Louisiana Civil Code are hereby amended and reenacted to read as follows:

Art. 208. Requirement to prove filiation

In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initi-

ative of the parent by legitimation or by acknowledgment under Article 203 must institute a proceeding under Article 209.

Art. 209. Proof of filiation

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

B. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

C. The right to bring this proceeding is heritable.

Comments

(a) Adopted children are legitimately filiated by the adoption proceeding itself and need not comply with this Article. See Civil Code Art. 214. "Informally acknowledged" children, as defined in the jurisprudence, do have to comply with this Article.

(b) Proof of filiation may include, but is not limited to: "Informal" acknowledgment; scientific test results; acknowledgment in a testament; and proof that the alleged parents lived in a state of concubinage at the time of conception. Contrary evidence would include but not be limited to the types of proof outlined in the Official Comments to Civil Code Art. 187.

(c) Venue for this proceeding is provided by Article 74.1 of the Code of Civil Procedure.

Section 2. Any person against whom the time period provided in this Act would otherwise have accrued except for the provisions of this Section shall have one year from its effective date to bring a proceeding to establish filiation of a child. If no such proceeding is timely instituted, such filiation may not thereafter be established.

STATEMENT OF THE CASE

This is an action by certain heirs of one Vileor "Bull" Harlaux to be recognized as such and thus to share in ownership of approximately 130 acres of property located in the Parish of Pointe Coupee, State of Louisiana.

The plaintiffs in this action are the legitimate children of Adese Harlaux, Vileor's son.

The defendant in this action is Leroy Harlaux, another one of Vileor's sons, but by a different mother than Adese.

Adese Harlaux, Leroy Harlaux and Pearl Harlaux (who is not a party to this action) are all illegitimate children of Vileor Harlaux who died in Pointe Coupee Parish in 1938. Vileor Harlaux died intestate, leaving neither ascendants nor legitimate descendants. Under Louisiana Succession Law in effect at that time, all of Vileor's property went to his sister, Marie Louise Harlaux. Vileor's illegitimate children (Adese, Leroy and Pearl) were prevented from sharing in his succession because of Louisiana Civil Code Article 919 which stated in pertinent part:

> **"Illegitimate children are called to the inheritance of their father, who has duly acknowledged them,**

when he has left no descendants nor ascendants nor collateral relations nor surviving spouse, and to the exclusion only of the State."

Marie Louise donated a portion of the property she received from Vileor Harlaux to defendant, Leroy Harlaux. Leroy Harlaux received the remainder of his grandfather's property from the testate succession of Marie Louise who died in 1951. Thus Leroy Harlaux obtained possession of *all* of his grandfather's property to the total exclusion of his brother and sister and their descendants. Leroy Harlaux has retained possession of his property to the present time and none of it has been transferred by any means to any third party outside of the Harlaux family.

Louisiana Civil Code Article 919, which prevented Adese, Leroy and Pearl from taking from their father's succession, was declared unconstitutional by the Louisiana Supreme Court in 1980 in *Succession of Brown*, 388 So.2d 1151 (La. 1980) (Appendix A-62). Thus if Adese, Leroy and Pearl had been legitimate when Vileor died or if Vileor died today, there would be no prohibition against their taking or receiving his property.

They, or their descendants would thus be co-owners in indivision of one-third of the property.

ACTION IN THE LOWER COURTS

On February 7, 1980 the plaintiffs instituted an action in Louisiana State Court to be recognized as co-owners in indivision of one-third of their grandfather's property to which they would be entitled under the then existing Louisiana Succession Law. The defendant responded by filing an Exception of No Cause of Action and of Prescription. The Trial Court sustained both exceptions (See Appendix A-21). The Louisiana First Circuit Court of Appeal, with one dissent, affirmed the Trial Court. (Appendix A-11)

While the present action was pending before the Louisiana Supreme Court, that Court rendered a decision on original hearing in *Succession of Clivens* (Appendix A-25). That decision determined that the *Succession of Brown, supra,* which declared Civil Code Article 919 unconstitutional should be applied retroactively to all heirs in intestate successions regardless of the date on which their ancestor died. The fact situation in *Succession of Clivens* is practically identical to that in the instant action except that the plaintiff in *Clivens* is an acknowledged illegitimate, while the instant plaintiffs' father was an unacknowledged illegitimate.

Rehearing was granted in *Succession of Clivens* and on January 10, 1983, the Louisiana Supreme Court reversed its original decision. (Appendix A-42) In the rehearing the Louisiana Supreme Court held that *Succession of Brown* would be applied retroactively as to testate and intestate successions only to those illegitimates whose ancestors had died since January 1, 1975. That date is the effective date of the new Louisiana Constitution, which specifically prohibits discrimination based upon the manner of a person's birth.

Plaintiffs are informed that the *Clivens* plaintiffs have also applied to this court for a Writ of Certiorari.

On the same day, the Louisiana Supreme Court rendered the decision in the instant action (Appendix A-3) declaring that, for the purpose of the application of the *Succession of Brown,* the same rules as were layed down in the *Succession of Clivens* would be applied to the unacknowledged illegitimates in the present action. The court ruled that unacknowledged illegitimates in intestate successions are not entitled to share in their ancestor's succession if that ancestor died before January 1, 1975. Plaintiffs in this action were thus denied all rights to claim from the succession of Vileor Harlaux.

Both of these decisions are final as to actions by Louisiana courts.

Plaintiffs seek writs of certiorari of this Honorable Court for the purpose of having this court declare that the decision of the Louisiana Supreme Court, denying succession rights to all illegitimates prior to January 1st, 1975, represents an arbitrary and invidious discrimination based on birth and as such is a violation of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE PETITION

The rights which plaintiffs seek through this action are the rights recognized by this Honorable Court in innumerable cases - the right to be free from arbitrary and discriminatory restrictions that unreasonably impinge on rights guaranteed by the Constitution of the United States of America. In *Trimble v. Gordon*, 450 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 1459 (1977), *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), *Gomez v. Perez*, 409 U.S. 535 (1973), *Levy v. Louisiana*, 391 U.S. 68 (1968) and similar cases this Honorable Court has recognized that a person should not be denied rights that the State has otherwise made available simply because of the fact of his illegitimate birth. The constitutional principles that can be gleaned from these cases are:

1. A state has the power to impose restrictions on classes such as illegitimates to promote identified and legitimate state policies.

2. When such restrictions are imposed, however, they are subject to review in light of the Fourteenth Amendment to the United States Constitution.

3. Such review is not "toothless". The state must be able to demonstrate that the restrictions promote legitimate important state interests and *that the means chosen to protect those interests bear an evident and substantial relationship to that goal.*

4. Overly broad restrictions which "fail to consider the possibility of a middle ground and which fail to consider the facts of particular cases" are prohibited.

5. Analyses based on hypothetical facts can not be used to save otherwise unconstitutional restrictions.

Thus the question posed here is *not*: "Can Louisiana impose reasonable restrictions on the rights of illegitimates in order to protect legitimate state interests?" Clearly it can. Rather the questions posed here are:

1. Does the decision in this case and in *Succession of Clivens*, in fact, promote policies and interests which the State of Louisiana has identified and adopted?

2. Are the justifications presented by the Louisiana Supreme Court in these cases sufficiently strong to withstand the heightened scrutiny that this court has recognized as appropriate for illegitimates?

3. Are the means adopted by the Louisiana Supreme Court in these cases broader than is constitutionally permissable to achieve legitimate state goals?

One point to be made at the outset. Unlike *Trimble v. Gordon, Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978), *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971) and the other cases cited above, this case does not question the constitutionality of the State's

statute. We are not dealing with a situation where a Legislature, after careful deliberation, has struck what it believes to be the most appropriate balance between competing interests. *There is no Louisiana statute which mandates the discrimination imposed on plaintiffs herein.* There is no statute that even permits it.

What is at issue here is the decision by the Louisiana Supreme Court. As will be discussed more fully below, this decision runs counter to and undermines the balance which the Louisiana Legislature has in fact adopted.

WHAT IS LOUISIANA'S POLICY AND STATE INTEREST WITH REGARD TO THE RIGHTS OF ILLEGITIMATES?

The analysis begins with the Louisiana Constitution. Louisiana's Constitution is relatively new (1974). It was adopted at a time when equal protection challenges from a variety of groups were being raised. In light of these social and legal concerns for the rights of minorities, the people of Louisiana deliberately and consciously chose to adopt a broad, equal protection provision. Article 1 Section 3 reads:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs or affiliations. No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of *birth*, age, sex, culture, physical condition, or political ideas or filiations. Slavery and involuntary servitude are prohibited, except in the latter case, as punishment for crime."

This provision "intentionally went further in our expressions of equality for all persons, than is provided in the United States Constitution or in the 1921 Louisiana Constitution".[1]

1. Succession of Civens, Appendix A, Page A-47.

As one doctrinal wriiter has stated:

> ". . . The equal protection guarantee that emerged [from the Constitutional Convention] is a broad one and was intended to be so. Surely the breadth of this provision will produce far reaching changes in the State, perhaps more than any other provision of the Constitution."
>
> * * *
>
> "Rather than leaving the development of the forbidden classification solely to the Courts, the choice was made to list a number of discriminatory bases which are prohibited. This was done partly to firmly establish protection against discrimination on those grounds and partly based on political considerations, to insure some minorities of protection by the use of clear language instead of depending on the legal construction of terms of art.[2]

This provision has further been interpreted to encompass within its scope any unreasonable discrimination against illegitimates.[3]

The actions of the Louisana Legislature similarly reflect a desire to accord illegitimates equality of rights. The listing shown on the following pages is but an example of the massive statutory changes which the Legislature has implemented to accomplish this goal.

STATUTORY CHANGES TO IMPLEMENT RIGHTS OF ILLEGITIMATES

1. Repeal of Civil Code Articles 181, 182, 183 and 202 - Elimination of classes of illegitimates.

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2. Hargrave, Lee. "Declaration of Rights in Louisiana Constitution", 35 Louisiana Law Review at P. 6.

3. *Succession of Thompson*, 367 So.2d 796 (La. 1979); *Succession of Robins*, 349 So.2d 276 (La. 1977).

2. Amendment to Civil Code Article 199 - Elimination of restrictions on the process by which illegitimates can be legitimated.

3. Amendment to Civil Code Article 200 - Elimination of restrictions against legitimation where there are ascendant and descendant relatives.

4. Repeal of Civil Code Article 204 - Elimination of restrictions against acknowledging children whose parents were incapable of marriage.

5. Repeal of Civil Code Article 212 - Elimination of restrictions against proving maternity where mother is a married woman.

6. Repeal of Civil Code Article 245 - Elimination of alimony to illegitimates from maternal line only.

7. Repeal of Civil Code Article 921 - Elimination of restrictions against illegitimates inheriting from their parents legitimate relations.

8. Amendment to Civil Code Article 902 and 917 (now Article 888) and redefining descendants to include illegitimates thereby placing illegitimates in the highest class to inherit both separate and community property.

9. Repeal of Civil Code Article 918 - Allowing elimination of restrictions on illegitimate inheriting from his mother.

10. Repeal of Article 919 - Elimination of restrictions on illegitimate inheriting from his father.

11. Repeal of Civil Code Article 920 - Repeal of limitation imposed on bastard adulterous or incestuous children which will allow them no inheritance rights except a "mere alimony".

12. Repeal of Article 925 - Eliminating requirement that an illegitimate be put into possession only by judicial decree.

13. Repeal of Article 927 requiring illegitimates to obtain an inventory of succession property.

14. Repeal of Article 928 and 932 - Elimination of prohibition against an illegitimate's alienating immovables from a succession for three years.

15. Repeal of Civil Code Article 922 and 923 - Elimination of restrictions on an illegitimate's rights to pass on his property through intestate succession.

16. Repeal of Civil Code Article 1483 - Eliminating the prohibition against an illegitimate receiving donations inter vivos beyond what is necessary for sustenance.

17. Repeal of Civil Code Article 1486 and 1487 - Eliminating restrictions on donations inter vivos from mother and father.

18. Repeal of Civil Code Article 1488 - Eliminating restrictions on donations inter vivos to adulterous children.

19. Amendment to Civil Code Article 1485 - Eliminating reference to legitimate children thereby making an illegitimate a forced heir and giving him a right of collation under Civil Code Article 1227 and a right of reduction under Civil Code Article 1502.

20. Amendment to R.S. 23:1021 - Expressly extending workmen's compensation benefits to illegitimates.

There is *nothing* in any of these statutes which expressly makes the rights accorded illegitimates dependent upon the 1974 Constitution or upon the date on which their ancestor died or upon the date their filiation was recognized.

The Louisiana Legislature, however, was not blind to the problems which may arise from expansion of the rights of illegitimates. It anticipated the problems of stale and frau-

dulent claims. It anticipated the problems of disruption of land titles and uncertainty about ownership of property. The Louisiana Legislature responded to these concerns by the adoption of a deliberate and limited structure that balances the competing interests of illegitimates against those of other relatives and third parties who may be affected. This structure is reflected in the following statutes.

Civil Code Article 209:

> "A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.
>
> B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceedings instituted by the child or on his behalf within the time limit provided in this Article.
>
> C. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

This article describes the statutory procedure by which an unacknowledged illegitimate can establish his filiation as a threshold step in claiming the rights which the Louisiana Legislature has provided. This is Louisiana's response to *Trimble v. Gordon, supra*, and *Lalli v. Lalli, supra*. This is

the "Lalli" procedure which plaintiffs here wish to follow in proving their filiation. Its source is the following two acts:

Act 549 of 1980

ILLEGITIMATE CHILDREN - PROOF OF FILIATION

An Act to amend and reenact Articles 208 and 209 of the Louisiana Civil Code and to repeal Articles 210 and 212 of the Louisiana Civil Code to provide for proof of filiation by illegitimate children, or presumption of filiation on their behalf; to provide a procedure and time limitations for proceedings to establish filiation; to provide for the method and standard of proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons in the successions of their alleged parents: and to provide otherwise with respect thereto.

Articles 208 and 209 of the Louisiana Civil Code are hereby amended to read as follows:

Art. 208. Authorization to prove filiation. Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation.

Art. 209. Methods of proving filiation.

1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this Article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.

2. A child who is shown to be the child of a woman on an original certificate of birth is presumed to be the child of that woman, though the contrary may be shown by a preponderance of the evidence.

3. An illegitimate child not shown as the child of a

woman on an original certificate of birth may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the illegitimate child of that woman.

4. A child of a man may prove filiation by any means which establish by a preponderance of the evidence, including acknowledgement in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

5. Proof of filiation must be made by evidence of events, conduct, or other information which occurred during the lifetime of the alleged parent. A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, unless there is a presumption of filiation as set forth in Section 2 above. If no proceeding is timely instituted, the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts.

Section 2. Articles 210 and 212 of the Louisiana Civil Code are hereby repealed.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Louisiana Constitution of 1974.

Section 4. Any illegitimate child nineteen years of age or older shall have one year from the effective date of

this Act to bring a civil proceeding to establish filiation under the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred.

Approved July 23, 1980

Act 720 of 1981

CHILDREN - PROOF OF FILIATION

An act to amend and reenact Articles 208 and 209 of the Louisiana Civil Code and to amend and reenact Subsection F. of Section 236.1 of Title 48 of the Louisiana Revised Statutes of 1950 to provide for proof of filiation by children, or on their behalf; to provide a procedure and time limitations for proceedings to establish filiation; to provide for the method and standard or proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons to establish filiation to their alleged parents; to authorize the Department of Health and Human Resources to institute proceedings to establish filiation under the Child Support Enforcement Program; and to provide otherwise with respect thereto.

Section 1. Articles 208 and 209 of the Louisiana Civil Code are hereby amended and reenacted to read as follows:

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In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must institute a proceeding under Article 209.

Art. 209. Proof of filiation.

A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or

by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article.

B. The proceeding required by this Article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation.

C. The right to bring this proceeding is heritable.

Section 2. Any person against whom the time period provided in this Act would otherwise have accrued except for the provisions of this Section shall have one year from its effective date to bring a proceeding to establish filiation of a child. If no such proceeding is timely instituted, such filiation may not thereafter be established.

These are the two statutes which amended Article 209 to adopt Louisiana's "*Lalli* procedure". Of particular interest here is the savings clause to these two statutes which accorded persons who would be adversely affected by the implementation of this statute one year in which to prove their filiation. Act 720, the current version of 209, is also critical in that it makes the right to bring an action for filiation heritable.

R.S. 9:5630 (formerly R.S. 9:5682):

A. An action by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, to assert an interest in an immovable formerly owned by the deceased, against a third person who has acquired an interest in the immovable by onerous title from a person recognized as an heir or legatee of the deceased in the judgment of possession,

or his successors, is prescribed in two years from the date of the finality of the judgment of possession.

B. This Section establishes an acquisitive prescription, and shall be applied both retrospectively and prospectively; however, any person whose rights would be adversely affected by this Section shall have one year from September 11, 1981 within which to assert the action described in Subsection A of this Section and if no such action is instituted within that time ,such claim shall be forever barred.

C. "Third person" means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession.

This statute limits the ability of an unrecognized heir, including illegitimates, to pursue immovable property from a succession that has been transferred to an owner as third party transferee.

Civil Code Article 1281:

If the donee, who owes the collation has alienated by onerous title the immovable given to him, the co-heirs shall not have the right to claim the immovable in the hands of the transferee.

This statute which was amended in 1981 limits the rights of a forcer heir, including illegitimates, to pursue property from a succession in a collation proceeding.

Civil Code Article 1517:

When the property given is no longer owned by the donee whose donation is subject to reduction, the donee is bound to return to the succession the value that the property has at the time of the opening of the succession.

This article which was amended in 1981, limits the rights

of a forced heir, including illegitimates, to pursue property in the hands of a third party in a suit for reduction.

These statutes are the balance which the Louisiana Legislature has struck. They reflect the policies and the relative weighing of interests which the Legislature has deemed appropriate. On one hand they accord illegitimates extensive new rights. On the other hand they limit the period during which these rights can be exercised and they require adequate proof and judicial review to establish filiation. Rights of third parties including other forced heirs and onerous transferees are protected by limiting the ability of an illegitimate to pursue property.

As stated by Professor Katherine Spaht in an article entitled "Establishing the Filiation of Illegitimate Children" in 42 La.L.R. 403:

> "Yet, on the other hand, the illegitimate child, affected by section 4 of Act 549 did not have the possibility of inheriting as a legitimate child until September 3, 1980. The illegitimate child, thereafter, had less than one year within which to file the action to establish filiation and, if successful, the possibility of inheriting property of the deceased parent. Of course, the purpose of the legislature in enacting Act 549, and in particular section 4, was to avoid subjecting the other heirs to the possibility of such suits indefinitely in the interest of stability of land titles."

Plaintiffs in this case have been denied the opportunity to participate in this structure which the Legislature created. Plaintiffs are fully prepared to pursue the proof of filiation required under Article 209 and they have brought their suit timely. While plaintiffs are not themselves illegitimate, they are suffering from disabilities which have been imposed upon

them because of an illegitimate ancestor. The Legislature specifically recognized this possibility and made Civil Code Article 209 heritable, thereby specifically addressing persons in plaintiffs' position. Thus it is not the statutes and not the policy reflected in these statutes which have denied plaintiffs their rights. Rather it is the judicial decisions in this case and in the *Succession of Clivens* which have resulted in their being dismissed on an exception of no cause of action, without even having an opportunity to participate in the structure and despite a timely filed action instituted prior to the termination of the grace period.

Clearly this decision is not in keeping with the Legislative intent and the expressions of policy and state interests which the people of Louisiana and the Legislature have adopted through their statutes and constitution.

As stated by Judge Ponder in his dissent (Appendix A-19):

"The question is one of legislative intent.

By holding that Section 4 of Act 549 has no effect upon the requirement that the proceeding be brought within six months of the death of the alleged parent, the majority is interpreting Section 4 as though it read:

> 'Any illegitimate child nineteen years of age or older *whose parent shall not be deceased and whose parent shall not die within six months* shall have one year, etc.'

Instead, I believe that the legislature intended to remedy the constitutional defect in our law so as to allow those who had been prevented from making a claim a period of one year to do so, without regard to the date of the parent's death. It

is true that this interpretation has the effect of adding to Section 4 some such provisions as, "this proceeding shall not be barred by the fact that the parent shall have been deceased by more than six months." But I would elect to interpret the provision thus so as to right as many wrongs as reasonably possible.

I would not deny this relief simply because the statute would still leave some inequities, such as the case cited of the ten year old whose parent died a year ago. That problem could be addressed by the legislature.

The fears of instability of land titles are more imaginary than real. The gates were opened for only one year, which has now passed. There is no evidence that any flood resulted.

I therefore dissent."

ARE THE JUSTIFICATIONS PRESENTED BY THE LOUISIANA SUPREME COURT STRONG ENOUGH TO WITHSTAND HEIGHTENED CONSTITUTIONAL SCRUTINY?

Since plaintiffs are being denied their rights on the basis of the Supreme Court's decision rather than on any statute, it is essential to analyze the rationale of that decision. That rationale is outlined in *Succession of Clivens* and adopted by reference in the present case. Thus the following discussion will center on *Succession of Clivens.*

Plaintiffs contend that this decision is internally inconsistent, it contradicts the directives of this Honorable Court, and it creates additional equal protection problems not previously envisioned. Most importantly the decision fails to articulate any identifiable state interests that are sufficiently strong to support the wholesale denial of rights to all illegitimates prior to January 1, 1975.

The primary issue in *Succession of Clivens* was the retroactivity of a prior Louisiana Supreme Court case, *Succession of Brown*, 388 So.2d 1151 (La. 1980). In *Succession of Brown* the Louisiana Supreme Court struck as unconstitutional Civil Code Article 919 which discriminated against illegitimates in inheritance from their fathers. Although Civil Code Article 919 had been previously upheld as constitutional in *Labine v. Vincent, supra,* the Louisiana Supreme Court found that that Article could not withstand the more intense scrutiny mandated by this Court in *Trimble v. Gordon. Succession of Brown* thus stated:

> **"We declare Civil Code Article 919 to be unconstitutional on the basis of the equal protection clause in the Fourteenth Amendment of the United States Con-**

stitution, and Article 1 Section 3 of the 1974 Constitution."[4]

This quote plus the analysis used in the *Succession of Brown* leaves no doubt that the underpinnings of that decision were both the United States and the Louisiana Constitution.

Succession of Brown left open the question of retrospective or prospective application of that decision. This was the question answered in *Clivens*. On original hearing, Louisiana Supreme Court declared that the *Succession of Brown* was retroactive indefinitely as to intestate successions and prospective only as to testate successions and third parties. On rehearing, the Louisiana Supreme Court reversed this position and flatly declared that *Brown* is retroactive only to January 1st, 1975, the date of the adoption of the Louisiana Constitution. Any illegitimate whose ancestor died prior to that date is apparently relegated to the succession rights that they had prior to *Succession of Brown*. For plaintiffs who seek to establish inheritance rights in an intestate succession of the paternal line, this means that they have no rights whatsoever. Under Article 919 if there are any heirs, ascendant, descendant or collaterals to an infinite degree, they have no right to participate in the succession.

Plaintiffs contend that the court's analysis on this issue of retroactivity is both inconsistent and contrary to the decisions of this Court.

In *Clivens*, the Louisiana Supreme Court applied the proper test of retroactivity, i.e., that of *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971). Ironically in applying this test the Court found that every one of the criteria was met and argued in favor of retroactivity. The Court's language could not have been clearer or stronger:

4. *Succession of Brown, supra*, at Appendix A, Page A-64.

1. Criterion One - Was the decision in *Brown* anticipated?

   "At a minimum [*Brown*] was clearly foreshadowed."

   "To say now that the decision in *Brown* was not foreshadowed by the 1974 Constitutional provision is to ignore its existence."

   Clivens, (Appendix, P. A-47).

2. Criterion Two - Will retrospective application promote or retard the decision in *Brown*?

   "A retroactive application of *Brown* will surely further its holding, and a prospective application would just as surely retard it."

   "The purpose and effect of [*Brown*] can only be furthered by a retroactive application."

   Clivens, (Appendix, P. A-48).

3. Criterion Three - Will inequity be imposed by a retroactive application?

   "The argument that the retroactive application of *Succession of Brown* will seriously disrupt land titles for a prolonged period of time has no merit."

   "Instances in which land titles are likely to be adversely affected have been minimized."

   "The feared onslaught of endless claims, will not occur."

   Clivens, (Appendix, P. A-52).

The Louisiana Supreme Court's analysis of *Chevron* is significant in that it rejects all of the arguments typically raised against according rights to illegitimates. The court recognizes the statutory scheme which the Legislature has adopted (as described in the previous section). It recognizes that this was intended to be a balancing of rights. It recognizes that land titles are no longer threatened. Finally, it acknowledges that *Chevron* is the proper test both because it

is a mandate of this court and because it is the approach adopted in Louisiana jurisprudence[5]. Yet retroactive application is denied to the facts of plaintiff's case. The rationale for this denial centers on five arguments in *Succession of Clivens* which begin on page A-54 of Appendix A.

Four of these arguments are presented with virtually no analysis or justification.

1. Serious prejudice would result to persons who were placed in possession of property many years ago. - The court simply states that it "finds merit in this argument". Plaintiff suggests that this is contradictory to the analysis that the Court previously made with reference to the *Chevron* test. It further ignores the statutory structure and protections which the Louisiana Legislature has provided.

2. Property owners may have relied on *Labine v. Vincent, supra,* and believed that Article 929 was constitutional. - No one in the present case was affected by *Labine v. Vincent* and no one relied thereon. Therefore, this reference is purely hypothetical as to the facts of plaintiff's case. In addition, plaintiff suggests that any such security resulting from *Labine v. Vincent,* even if it existed, was ill-founded. *Labine* was harshly criticized in *Trimble,* six years later. The Illinois statute struck down in *Trimble v. Gordon* was "very similar" to Article 919 as the *Clivens* court recognized. Even before *Trimble,* developments in related areas of law showed that *Labine* was questionable.[6]

   Louisiana' own jurisprudence, as the Court noted in *Clivens,* foreshadowed potential rights of illegitimates:[7]

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5. See for example, *Lovell v. Lovell,* 378 So.2d 418 (La. 1979). See also *Succession of Layssard,* 412 So.2d 135 (3rd Cir. 1982); *Villa Nueva v. Schwall,* 408 So.2d 1186 (4th Cir. 1982); *Succession of Ross,* 408 So.2d 1188 (4th Cir. 1981); *Stafford v. Division of Administration,* 409 So.2d 87 (1st Cir. 1981); *Thibodeaux v. Thibodeaux,* 388 So.2d 125 (3rd Cir. 1980).

6. See for example *Gomez v. Perez, supra; Matthews v. Lucas,* 427 U.S. 495 (1976).

7. See *Succession of Clivens.*

> Another fact worth noting, although not dispositive, is that knowlegable attorneys handling successions have been alert to the possible rights of non-legitimates, and have, accordingly, required that affidavits of death and heirship in successions exclude the existence of non-legitimate children. (Referring to *Henry v. Jean*, 115 So.2d 363 (La. 1959).)

Louisiana Doctrinal writers have similarly alerted the legal community to the emerging rights of illegitimates.[8]

3. On pages A-55 and A-56 the Court reverts to its analysis of the third prong of the *Chevron* test (balancing of the equities) and concludes without argument that this balance is "better struck by a limited retroactive application of the *Brown* decision to the January 1, 1975, the effective date of the new Constitution, and no further". This conclusion is clearly contradictory to the Court's position just a few pages earlier and is supported by no analysis, let alone any articulation of a legitimate state interest that would lead to this decision.

4. On page A-56 of *Clivens* the Court raises the issue of third parties who may be in possession of property now claimed by illegitimates and/or heirs who may be subject to accounting for succession property previously alienated. The Court states only that "these concerns are well taken". This is no analysis. The concern over third parties is not even an issue in the present case because the property is all still in the hands of the Harlaux family. In any event, this cursory and conclusory statement about the rights of third parties does not represent a legitimate state interest sufficient to deny all rights prior to 1975 nor does it take into consideration the protections for third parties and forced heirs which the Louisiana Legislature has provided.

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8. Pascal, Robert A., "Louisiana Succession and Related Laws and the Illegitimate: Thoughts prompted by *Labine v. Vincent*", 46 Tulane Law Review 167 (1971); "Can Louisiana succession law survive in light of the Supreme Court's recent decision recognition of illegitimate's rights?" 39 Louisiana Law Review 1132 (1979).

The only argument to which the Court devotes any discussion is that which follows:

> Because of the unique nature of Louisiana succession Law, which Constitutionally requires forced heirship (La.Const. art. XII, § 5), a testator is not free to bequeath all his property to whomever he pleases if he leaves descendants. Descendants have a constitutional, as well as a statutory, right to a forced portion. To deny an illegitimate descendant a forced portion in a testate succession, while affording a legitimate descendant such a right, is as constitutionally impermissible as denying an illegitimate child his right in an intestate succession. There is no basis for making such a distinction and such a holding fosters rather than remedies discrimination against illegitimates.

The court expressed concerns here about a perceived conflict between the original decision in *Clivens* and Louisiana constitutional and statutory provisions on forced heirship. The Court is concerned that in original *Clivens* heirs in testate successions from the period of 1975 to 1980 would be denied the forced portion which is constitutionally guaranteed under Article 12, Section 5 of the Louisiana Constitution. Apparently, in the interest of preserving the forced portion to this group, the Louisiana Supreme Court reversed original *Clivens* and denied all rights to illegitimates prior to January 1, 1975. There is no reasonable justification for this conclusion.

First, neither the facts of this case nor the facts of *Clivens* even present the issue of an illegitimate in a testate succession between 1975 and 1980. Thus plaintiffs here and in *Clivens* are being denied their rights solely on the basis of a hypothetical group whose existence has not even been shown and who are certainly not parties to these actions. As this Honorable Court stated in *Trimble* at 774:

> "By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: The constitutionality of discrimination against illegitimates in testate and intestate succession law.
>
> Hard questions can not be avoided by hypothetical reshuffling of the facts."

Secondly, assuming Louisiana has a strong interest in the concept of forced heirship, the decision in *Clivens* on rehearing and in the present case does more violence to that concept than did original *Clivens*. Rather than denying the forced portion to a select group between 1975 and 1980, these decisions deny the forced portion to the entire group of illegitimates prior to 1975.

Thirdly, the selection of the date of January 1, 1975, has no relationship to the concept of forced heirship. Forced heirship did not originate in 1975. It has been recognized statutorily since the earliest days of the Civil Code and constitutionally since 1921.

Fourthly, this concern about forced heirship places Article 12 Section 5 directly in conflict with Article 1 Section 3 creating equal rights in Louisiana.

The Court's solution sacrifices the latter to the former. The solution is neither justified in light of Article 1 Section 3 nor is it effective in preserving the rights of forced heirs. Article 1 Section 3 is undoubtedly the broader expression of equality. That expression which has been described as "encompassing the entire range of discriminatory practices based on illegitimacy[9] is now being narrowed in order to accommo-

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9. *Clivens, supra*, A-47; *Succession of Thompson, supra.*

date Article 12 Section 5. Article 12 Section 5 is a very constrained provision; it prohibits only the "abolition" of forced heirship and expressly recognizes the right to provide "by law" for definitions of forced heirs, forced portion and grounds for dishersion. The original *Clivens* in no way abolished forced heirship. It did no more than define forced heirs as provided "by law". If there is a conflict between Article 1 Section 3 and Article 12 Section 5, the appropriate constitutional analysis would be to allow the former to prevail.

Finally, plaintiffs contend that the Louisiana concept of forced heirship is not "strong enough" in a constitutional sense to permit the wholesale denial of rights to illegitimates. While the concept of forced heirship is constitutionally guaranteed, actions of the Louisiana Legislature in recent years have shown that concept has been severely narrowed and eroded. For example:

a) Forced heirship for ascendants has been totally eliminated with the repeal of Civil Code Article 1494.

b) The forced portion has been severely reduced. In the 1808 Code, the forced portion was 4/5th's of the decedent's property. The fraction was later reduced to 1/3 if there was one child, 1/2 if two children and 2/3 if more than two children. In 1981 the percentage was further reduced so that the present law provides for 1/4 forced portion if there is one child and 1/2 if there is more than one child.

c) The Legislature has authorized in Civil Code Article 890 the creation of a usufruct for a surviving spouse over community property. The Legislature has statutorily declared that this usufruct is not an impingement on the forced portion even though under traditional principles of forced heirship it would be.

d) Civil Code Article 890 also authorizes the creation of

a usufruct over separate property, again declared to be not an impingement on the forced portion.

e) La. R.S. 9:1841 - 1847 permit the creation of a forced portion in trust. These provisions permit the establishment of conditions and limitations on control of the forced portion contrary to traditional principles.

f) The Legislature has statutorily exempted insurance, retirement benefits and various compensation plans from the procedure for calculating the total mass of the decedent's succession. This statute is an indirect attack on the forced portion in that, by excluding these items, the total mass of the succession is reduced and thus the forced portion is reduced.

g) La. R.S. 9:1254 also exempts from the calculation of the mass donations given to prior spouses. This is an indirect attack on the forced portion by reducing the mass.

h) La. R.S. 9:2372 exempts gifts to charitable organizations. This is also an indirect attack on the forced portion by reducing the mass.

These recent legislative developments reflect an erosion of the traditional concepts of forced heirship, which can be interpreted as a decline in the strength of the State interest in that principle. The weakness of the principle is further shown by the fact that no other state in the Union now has or has ever adopted the concept of forced heirship, except for Texas for a brief period in the early 1800's. Yet that principle is now being opposed against the rights of illegitimates resulting in the denial of the latter's rights. Plaintiffs suggest that the true "State interest" which the State of Louisiana has adopted and is protecting is not the concept of forced heirship but rather is the protection of the rights of illegitimates, whose rights have been constantly expanding simultaneously with the decline of forced heirship.

In summary, the rationale of the *Succession of Clivens* in no way reflects a strong identifiable State interest or policy which would be protected by the approach adopted in this decision. Rather the decision runs contrary to the intent of the Legislature and the balancing of interests which Louisiana's lawmakers have chosen to adopt. The Louisiana Supreme Court has posited no constitutionally valid argument to substitute for the Legislature's decisions. Thus plaintiffs contend that this decision places the law of Louisiana in direct conflict with the Fourteenth Amendment to the United States Constitution and offers no counterbalancing legitimate State interest to justify the discrimination being imposed on plaintiffs here.

ARE THE MEANS ADOPTED BY THE LOUISIANA SUPREME COURT IN CLIVENS AND THIS PRESENT CASE BROADER THAN CONSTITUTIONALLY PERMISSIBLE TO ACHIEVE LEGITIMATE STATE GOALS?

The decision in *Clivens* and in the present case does not reflect any legitimate State interest sufficient to justify the denial of their rights. However, even if the rationale outlined by the Louisiana Supreme Court was adequate, the means chosen to implement the decision sweep more broadly than necessary and thus can not withstand heightened constitutional scrutiny.

The date chosen by the Supreme Court, January 1, 1975, does not bear a rational relationship, to say nothing of an evident and substantial one, to the rights which plaintiffs assert here. Plaintiffs' rights do not arise out of the Louisiana 1974 Constitution nor are they unique to Louisiana. Illegitimates have protection against arbitrary unreasonable discrimination based on the United States Constitution, as is obvious from *Trimble v. Gordon*. Furthermore, Louisiana's own jurisprudence in *Succession of Brown* recognized this dual constitutional basis for these rights. Yet the United States Constitution was totally ignored in *Succession of Clivens*. There was no Federal Constitutional analysis nor was there any attempt to harmonize the denial of rights here to the protections that that Constitution would provide. Plainiffs contend that this failure to consider the constraints imposed on heir decision by the United States Constitution and the failure to offer any rational explanation for this limitation renders the decision invalid under the Fourteenth Amendment.

Secondly, the selection of January 1, 1975, or any other date represents a return to the "minimum scrutiny" approach which *Trimble v. Gordon* prohibits. In selecting this or any

other date the Louisiana Supreme Court gave no consideration whatsoever to the situation of the plaintiffs in *Clivens* and in the present case. It gave no consideration to the ability of these plaintiffs to prove their filiation or to trace and account for property from their ancestors' succession. This is particularly ironic in view of the fact that in both of these cases the property is totally intact, still within the hands of members of the family. On the other hand there are undoubtedly plaintiffs whose ancestor has died since 1975 who would have extremely difficult problems in accounting for property and tracing its possession. Thus, even assuming that the State has a legitimate and important State interest in minimizing accounting problems, the arbitrary selection of January 1, 1975 does not correct nor even offer a rational solution to these problems.

The selection of that date, in fact, creates new equal protection questions by creating a class of illegitimates pre-1975 whose rights are totally different from those post-1975 without regard to unique circumstances of members of these groups.

Finally, the Louisiana Supreme Court has failed to even consider that there are alternatives for satisfying the rights of illegitimates without seriously disrupting the possession of property and the stability of land titles. Doctrinal writers as early as 1971[10] recognized that the rights of illegitimates can be satisfied in the form of credits against the deceased's succession rather than by providing them with fractional interest in the property itself. The Court has also failed to consider the possibility of offering alternatives to the illegitimate and owners of the succession property allowing them to work out mutually agreeable arrangements of paying in cash, partitions, credits or liabilities, as best suits their unique factual

10. See Pascal, Robert A., *supra*.

situation with the only overriding principle being that the illegitimate eventually receives the appropriate value to which he is entitled. Thus the arbitrary selection of a day which ignores the factual situation of the parties and the alternatives available sweeps more broadly than is constitutionally permitted. It interferes more seriously with the fundamental rights of illegitimates than the State of Louisiana can justify.

CONCLUSION

Plaintiffs' situation here is very amply described by a noted Louisiana doctrinal writer who as early as 1971 anticipated the kinds of problems plaintiffs now face. Referring to former Louisiana statutory provisions, he stated:

> "These principles and rules may not meet the standards of our time for rules oriented toward the maximization of the common good; but they do reflect criteria of another day which may well have been judged proper to that end under the circumstances of time and place. [I]t may have been impossible to find the common good elsewhere than [by] walking a juridical tightrope with domestic and social peace and general economic stability on one side and justice for illegitimates on the other. Ill will must not be presumed. Law, like politics, is an art of the possible and the practical effort to achieve good order. For the same reason, nevertheless it would be inexcusable for people not to seek improvement in their laws once the existing rules were found to be less effective than they might be for that purpose.
> The fact is that the laws did not change, but they are not enough to do justice according to the present thought and conditions.[11]

Louisiana has undoubtedly done much to improve the status of illegitimates. The Louisiana Legislature has layed

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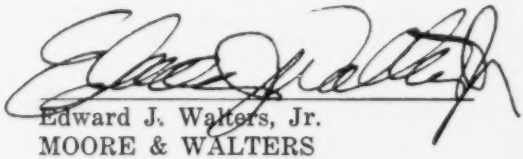
11. Pascal, *supra*, at 177.

down a workable structure which balances in an equitable fashion the competing interests that are inevitably involved as new rights are recognized. Plaintiffs ask only for the opportunity to participate in the structure that the Legislature has layed down.

Plaintiffs therefore pray that this Honorable Court decree that the denial of plaintiffs' rights as provided for in the decision of the Louisiana Supreme Court is violative of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing has been served on counsel for all parties in these proceedings, by First Class United States Mail properly addressed and postage prepaid on the 6 day of May, 1983.

Edward J. Walters, Jr.

APPENDIX

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APPENDIX A

Eddie HARLAUX, Roland Harlaux, Leon Harlaux, Lionel Harlaux, Cecil Harlaux, and Stella Harlaux Manchester

v.

Leroy HARLAUX.

No. 82-C-0760.

Supreme Court of Louisiana.

Jan. 10, 1983.

Rehearing Denied Feb. 11, 1983.

Legitimate children of grandfather's allegedly unacknowledged illegitimate son filed petitory action claiming interest in certain property owned by grandfather's second allegedly illegitimate son. The 18th Judicial District Court, Parish of Point Coupee, Daniel B. Kimball, Jr., maintained exception of no cause of action, and petitioners appealed. The Court of Appeal, Lottinger, J., 411 So.2d 581, affirmed. On writ of certiorari or review, the Supreme Court, Calogero, J., held that: (1) *Brown* decision, holding unconstitutional succession statute barring illegitimate children from inheriting from their natural fathers in same manner as legitimate children, would be applied retroactively, with respect to unacknowledged illegitimates as well as acknowledged illegitimates, back only to effective date of 1974 Louisiana Constitution, and (2) where petitioner's alleged grandfather died before such date, petition failed to state cause of action.

Affirmed.

Marcus, J., concurred and assigned reasons.

Dixon, C.J., and Lemmon, J., dissented and would grant a rehearing.

1. Courts 100(1)

Louisiana Supreme Court's *Brown* decision, holding unconstitutional succession statute barring illegitimate children from inheriting from their natural fathers in same manner as legitimate children, applied retroactively, with respect to unacknowledged illegitimates as well as acknowledged illegitimates, back only to effective date of 1974 Louisiana Constitution, where decision was first foreshadowed by provision of such Constitution, decision's purpose to vindicate constitutional rights of illegitimates would be seriously retarded by solely prospective application, and any inequities which might result were minimized by limited retroactive application and legislative action. LSA-C.C. art. 209; art. 919 (Repealed); LSA-R.S. 9:5682 (Repealed); LSA-Const. Art. 1, § 3.

2. Courts 100(1)

Generally, unless decision specifies otherwise or its retroactive application would produce substantial inequitable results, it is to be given prospective and retroactive effect.

3. Illegitimate Children 86

Where alleged grandfather of children of grandfather's allegedly unacknowledged illegitimate son died prior to effective date of 1974 Louisiana Constitution, children's petition claiming interest in certain property owned by grandfather's second allegedly illegitimate son failed to state cause of action, irrespective of whether children were entitled to prove their deceased father's filiation to grandfather and could actually do so. LSA-C.C. arts. 208, 209; art. 919 (Repeapel); LSA-R.S. 9:5682 (Repealed); LSA-Const. Art. 1, § 3.

Edward J. Walters, Jr., Keith B. Nordyke, Moore & Walters, Randall J. Cashio, Cashio & Cashio, Baton Rouge, for applicant.

John Wayne Jewell, Law Offices of J. P. Jewell, Jr. and John Wayne Jewell, New Roads, for respondent.

CALOGERO, Justice.

In *Succession of Brown*, 388 So.2d 1151 (La. 1980), we affirmed a Court of Appeal, 411 So.2d 581, judgment holding that La.C.C. art. 919, which barred illegitimate children from inheriting from their natural fathers in the same manner as legitimates, was unconstitutional. Plaintiffs' petitory action presents the question, among others, of whether *Succession of Brown* should be applied retroactively and, if so, to what extent. That question has this day been answered in our opinion in *Succession of Clivens*, 426 So.2d 585 (La. 1983), on rehearing, wherein we held that *Succession of Brown* would have a limited retroactive application back to January 1, 1975, the effective date of the present Louisiana Constitution.

Plaintiffs, Eddie Harlaux, Roland Harlaux, Leon Harlaux, Lionel Harlaux, Cecil Harlaux and Stella Harlaux Manchester, filed this petitory action on July 14, 1980 claiming an interest in certain property owned by the defendant Leroy Harlaux. Plaintiffs are the legitimate children of one Adese Harlaux, now deceased. They allege that Adese and the defendant Leroy were the illegitimate children of Vileor Harlaux. Vileor died intestate in 1938 possessed of certain property.[1] The property, hereinafter referred to as the False

1. The land in question is legally described as follows:

A certain tract of land with all the buildings and improvements thereon, situated on the Island of False River in the Parish of Pointe Coupee, State of Louisiana, fronting four and one half (4 & ½) arpents on said False River by a depth of forty (40) arpents, the side lines closing towards the rear according to titles, which tract of land contains One Hundred Thirty & 00/100 (130.00) acres, more or less, and is bounded on one side by property belonging to Albert Bergeron and on the other side by property belonging to Mrs. Eustis Lebeau.

River property, is now fully titled in the name of Leroy Harlaux.[2]

Defendant responded to the suit by filing exceptions of no cause of action and prescription. Defendant claims, through the exception of no cause of action, that plaintiffs have failed to state any factual basis for their entitlement to an interest in the property. The prescription exception was based upon La.R.S. 9:5682 which provided that an heir's action against a third party to recover property prescribes in ten years.[3]

Plaintiffs filed an opposition to the exceptions arguing that their right to the property was sufficiently set forth in the petition by virtue of the allegations that they are the children of Adese Harlaux, the now deceased illegitimate child of Vileor Harlaux and thus, as a matter of law, under *Succession of Brown, supra*, entitled to their father's share of Vileor Harlaux's property.

The trial court sustained the no cause of action exception on the finding that the plaintiffs had not proven their filiation to Vileor Harlaux and that they were prohibited from doing so under La.C.C. art. 209. The latter, the trial court determined, was because (1) plaintiffs, as simply the descendants of an illegitimate, are not authorized by La.C.C. art. 209 to bring a filiation action, and (2) independently of the foregoing, plaintiffs had not come within the grace period

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2. When Vileor Harlaux died in 1938, he left neither ascendants nor legitimate descendants. Thus his estate, including the False River property, was inherited by his sister Marie Louise Harlaux. Marie donated a part of the False River property to Leroy Harlaux on May 24, 1951, and she bequeathed the balance to him by will. The succession judgment of possession was dated September 7, 1951.

3. La.R.S. 9:5682 essentially provided that an unrecognized heir's claim against a third party who has acquired an interest in an immovable formerly owned by the deceased prescribed in ten years. That provision was repealed by Act No. 721 of 1981 and replaced by La.R.S. 9:5630 which provides for a *two* yeyar prescriptive period.

of the statute (La.C.C. art. 209) which otherwise prohibits their right to prove filiation. The court further held that even if plaintiffs could prove their filiation, their petititon nonetheless stated no cause of action because *Succession of Brown* was not to be applied retroactively. The trial court also sustained defendant's prescription exception holding that plaintiffs were barred from asserting their claim under La.R.S. 9:5682, since over ten years had elapsed since the judgment of possession, during which time Leroy Harlaux and his ancestor in title have peaceably possessed the property.

The Court of Appeal affirmed the trial court judgment on all three grounds. The Court of Appeal held that *Succession of Brown* was not to be applied retroactively, that plaintiffs were not allowed to prove filiation under the grace period of La.C.C. art. 209, and that their action had, in any event, prescribed under La.R.S. 9:5682.

[1] We granted plaintiff's writ application, 414 So.2d 380 (La. 1982), No. 82-C-0760, and a writ application in the case of *Succession of Clivens*, 426 So.2d 585 (La. 1982), to address the question of the retroactivity of *Succession of Brown*, an issue which has been troubling both the bench and the bar especially in the area of land titles. For the reasons expressed fully in *Clivens*, and briefly below, we hold that *Succession of Brown* will be applied retroactively only back to January 1, 1975, the effective date of the 1974 Louisiana Constitution, and no further.

In *Succession of Brown*, this Court affirmed the Court of Appeal judgment holding that La.C.C. art. 919 was unconstitutional in that it unreasonably discriminated against illegitimate children by denying them the same inheritance rights in the successions of their fathers, under any circumstances, as are enjoyed by their legitimate counterparts. In doing so,

we relied upon the United States Supreme Court case of *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), and Article I, Section 3 of the Louisiana Constitution of 1974.

[2] As discussed more fully in our opinion in *Succession of Clivens*, generally, unless a decision specifies otherwise, or its retroactive application would produce substantial inequitable results, it is to be given prospective *and* retroactive effect. *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Lovell v. Lovell*, 378 So.2d 418 (La. 1979). We are guided in our determination of whether a decision should *not* be applied retroactively by certain factors previously noted in our decision in *Lovell v. Lovell, supra*, which relied on the United States Supreme Court decision in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). In *Lovell* we stated:

> (1) the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.

As we held in *Succession of Clivens*, in considering these three factors in light of the Louisiana constitutional provision upon which we relied in *Succession of Brown* to find that La.C.C. art. 919 was unconstitutional, we conclude that the balance between them is best struck by applying *Succession of Brown* retroactively to the effective date of the Louisiana Constitution, January 1, 1975. This is so because the decision in *Brown* was first foreshadowed by Article I, Section 3 of

the 1974 Constitution, the purpose of the decision in *Brown*, to vindicate the constitutional rights of illegitimates, would be seriously retarded by solely a prospective application of the decision, and any inequities which may result are minimized by a limited retroactive application and prompt recent actions by the legislature. *See Succession of Clivens*, On Rehearing, 426 So.2d 585 (La. 1983), for a more in depth discussion.

We find no reason to come to a different conclusion as pertains to unacknowledged illegitimates, as are involved in this case, in that the blanket exclusion of unacknowledged illegitimates from any inheritance rights in their fathers' intestate successions, notwithstanding that a child might be able to comply with reasonable rules on proof of paternity or filiation, presents the identical considerations involved in the exclusion of acknowledged illegitimates from inheritance rights in their fathers' successions. It is an unreasonable discrimination that bears no rational relationship to a legitimate state interest. *Succession of Brown, supra.*

Anticipating our affirmance of the Court of Appeal holding in *Succession of Brown*, that La.C.C. art. 919 was unconstitutional, the Legislature passed Act No. 549 of 1980, amending La.C.C. arts. 208 and 209 on proof of filiation of *unacknowledged* illegitimates. These articles were again amended in 1981 by Act. No. 720 and essentially allow an unacknowledged illegitimate child to prove his filiation provided the suit is "brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs." Both amendments provided grace periods to allow those who would otherwise be barred by the enactment time to bring their action. While there is an issue presented in the instant case as to whether the plaintiffs herein come within the grace period, that issue is made

moot by our holding that *Succession of Brown* is only to be retroactively applied to January 1, 1975.

[3] Vileor Harlaux died in 1938. Therefore, irrespective of whether plaintiffs are entitled to prove their deceased father Adese's filiation to Vileor Harlaux and can actually do so, their petition in this petitory action states no cause of action.

Likewise, the issue concerning whether or not plaintiff's claim is prescribed under La.R.S. 9:5682 is made moot by our holding on the retroactivity issue.

Therefore, since plaintiff's alleged grandfather died in 1938, and since we have concluded that our decision in *Brown*, that La.C.C., art. 919 is unconstitutional will only be retroactively applied to January 1, 1975, we hold, for the reasons stated above, that the lower courts were correct in their judgments that plaintiff's petition states no cause of action.

Decree

For the foregoing reasons, the Court of Appeal judgment and the district court judgment, sustaining defendant's no cause of action exception, are affirmed.

AFFIRMED.

MARCUS, J., concurs and assigns reasons.

LEMMON, J., dissents.

MARCUS, Justice (concurring).

I consider that *Succession of Brown* should only be applied prospectively from September 3, 1980, the date the decision was rendered. Hence, plaintiff's claim in the instant case would be barred. Accordingly, I concur in the result reached in this case.

Eddie HARLAUX, Roland Harlaux, Leon Harlaux, Lionel Harlaux, Cecil Harlaux and Stella Harlaux Manchester

v.

Leroy HARLAUX.

No. 14614.

Court of Appeal of Louisiana,
First Circuit.

March 2, 1982.

Writ Granted May 7, 1982.

Children and heirs of illegitimate son of their grandfather, whose property was at issue, appealed from a judgment of the 18th Judicial District Court in and for the Parish of Pointe Coupee, Daniel P. Kimball, J., maintaining preemptory exceptions of prescription and no cause of action in favor of grandfather's second son, who was in possession of the property. The Court of Appeal, Lottinger, J., held that: (1) children and heirs of illegitimate son seeking to prove filiation of their father to their grandfather could not do so under the Act, because the grandfather had been dead for more than six months prior to commencement of the suit, and (2) because second son of grandfather had held property of grandfather in question in excess of ten years, statute barred assertion of claim to the property by children and heirs of illegitimate son.

Affirmed.

Ponder, J., dissented and filed opinion.

1. Illegitimate Children 82

Section of Act amending code article governing methods of proving filiation, which section provided that any "illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding

to establish filiation under the provisions of this Act" did not dispense with requirement in section of civil article providing that "a civil proceeding to establish filiation must be brought within six months after the death of the alleged parent"; therefore, children and heirs of illegitimate son seeking to prove filiation of their father to their grandfather could not do so under the Act, because the grandfather had been dead for more than six months prior to commencement of the suit. LSA-R.S. 9:5682 (Repealed); Acts 1980, No. 549, §§ 1 et seq., 4; LSA-C.C. arts. 209, 209, subd. 5.

2. Illegitimate Children 86

Even if children and heirs of illegitimate son established, under Act, filiation of their father to their grandfather, Act's one-year limitation within which to bring an action to prove filiation would have been without effect on statute providing that an "action by a person who is an heir or legatee of a deceased person, and who has not been recognized as such * * * to assert any right * * * in any of the property formerly owned by the deceased against a third person * * * is prescribed in ten years if the third person, or his ancestors in title * * * have been in continuous * * * possession of the property for such period"; therefore, because second son of grandfather had held property of grandfather in question in excess of ten years, statute barred assertion of claim by children and heirs of illegitimate son. LSA R.S. 9:5682 (Repealed); Acts 1980, No. 549, § 1 et seq.

Keith B. Nordyke, Moore & Walters, Baton Rouge, for appellants-plaintiffs.

John Wayne Jewell, New Roads, for appellee-defendant.

Before ELLIS, LOTTINGER and PONDER, JJ.

LOTTINGER, Judge.

This is a petitory action by plaintiffs, Eddie Harlaux, Roland Harlaux, Leon Harlaux, Lionel Harlaux, Cecile Harlaux and Stella Harlaux Manchester, against the defendant, Leroy Harlaux. From a judgment maintaining peremptory exceptions of prescription and no cause of action, plaintiffs have appealed.

FACTS

Plaintiffs claim that the defendant is the possessor of certain immovable property, to wit:

> A certain tract of land with all the buildings and improvements thereon, situated on the Island of False River in the Parish of Pointe Coupee, State of Louisiana, fronting four and one half (4 & ½) arpents on said False River by a depth of forty (40) arpents, the side lines closing towards the rear according to titles, which tract of land contains One Hundred Thirty & 00/100 (130.000) acres, more or less, and is bounded on one side by property belonging to Albert Bergeron and on the other side by property belonging to Albert Bergeron and on the other side by property belonging to Mrs. Eustis Lebeau.

in which plaintiffs have a one-third interest and pray that the property be partitioned.

The petition alleges that the property in question was acquired by Vileor Harlaux in 1935, that Vileor Harlaux died in 1938 leaving three children, namely Adese Harlaux, Leroy Harlaux, and Pearl Harlaux, and the plaintiffs are the children and heirs of Adese Harlaux. Plaintiffs claim that Adese Harlaux inherited a one-third interest in this property from his father, and as the children and heirs of Adese Harlaux plaintiffs also inherited this one-third interest.

Defendant filed an exception of no cause of action grounded on the proposition that plaintiffs failed to allege facts

which prove valid title in themselves. Plaintiffs allege they are the heirs of Vileor Harlaux.

In sustaining the exception of no cause of action the trial judge held *Succession of Brown*, 388 So.2d 1151 (La. 1980) applied prospectively only, and that the one year grace period granted in Act 549 of the 1980 Regular Session was inapplicable.[1]

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1. Act 549 of the 1980 Regular Session of the Louisiana Legislature reads as follows:

AN ACT

To amend and reenact Articles 208 and 209 of the Louisiana Civil Code and to repeal Articles 210 and 212 of the Louisiana Civil Code to provide for proof of filiation by illegitimate children, or presumption of filiation on their behalf, to provide a procedure and time limitations for proceedings to establish filiation, to provide for the method and standard of proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons in the successions of their alleged parents; and to provide otherwise with respect thereto.

Be it enacted by the Legislature of Louisiana.

Section 1. Articles 208 and 209 of the Louisiana Civil Code are hereby amended and reenacted to read as follows:

Art. 208. Authorization to prove filiation. Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation.

Art. 209. Methods of proving filiation. 1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this Article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.

2. A child who is shown to be the child of a woman on an original certificate of birth is presumed to be the child of that woman, though the contrary may be shown by a preponderance of the evidence.

3. An illegitimate child not shown as the child of a woman on an original certificate of birth may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the illegitimate child of that woman.

4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

5. Proof of filiation must be made by evidence of events, conduct, or

The exception of prescription is based on La.R.S. 9:5682[2] and the fact that when Vileor Harlaux died intestate in 1938, he left neither ascendants nor legitimate descendants, thus

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other information which occurred during the lifetime of the alleged parent. A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceding to establish filiation must be instituted witihn six months of its birth, unless there is a presumption of filiation as set forth in Section 2 above. If no proceeding is timely instituted, the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts.

Section 2. Articles 210 and 212 of the Louisiana Civil Code are hereby repealed.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Louisiana Constitution of 1974.

Section 4. Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred.

2. La.R.S. 9:5682 provides:

"5682. Actions by unrecognized heirs or legatees against third persons.

"A. An action by a person who is an heir or legatee of a deceased person, and who has not been recognized as such in the judgment of possession rendered in the succession of the deceased by a court of competent jurisdiction, to assert any right, title, or interest in any of the property formerly owned by the deceased against a third person who has acquired this property from or through a person recognized as an heir or legatee of the deceased in this judgment of possession, is prescribed in ten years if the third person, or his ancestors in title, singly or collectively, have been in continuous, uninterrupted, peaceable, public, and unequivocal possession of the property for such period after the registry of the judgment of possession in the conveyance records of the parish where the property is situated, irrespective of the good or bad faith of the third person's ancestors in title, including the heir or legatee of the deceased recognized as such in the judgment of possession.

"B. This Section establishes a liberative prescription, and shall be applied both retrospectively and prospectively; provided, however, that an action by any person against whom the period of liberative prescription herein provided would otherwise already have accrued except for the provisions of this Section, must be brought within one year from and after August 1, 1975.

"C. As used herein, "third person" means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession."

his estate was inherited by his sister Marie Louise Harlaux.[3] Marie Louise donated a part of the subject property to defendant, Leroy Harlaux, on May 24, 1951, and Leroy Harlaux inherited the remainder of the subject property as a legatee in the Succession of Marie Louise Harlaux, No. 3735 on the Docket of the Eighteenth Judicial District Court, in and for the Parish of Pointe Coupee, Louisiana by judgment of possession dated September 7, 1951.

The trial judge held that Leroy Harlaux was a third party as to Vileor Harlaux's succession, had held said property in excess of 10 years, and La.R.S. 9:5682 was thus applicable.

SPECIFICATION OF ERROR

In appealing plaintiffs alleged the trial judge erred in sustaining both exceptions.

PRESCRIPTION

Plaintiffs argue that the state's interest in stable land titles as recognized in *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) "must yield to constitutional mandates," citing *Succession of Brown*, supra. Continuing, they argue that Section 4 of Act 549 of 1980 establishes a new prescriptive period thus repealing that part of La.R.S. 9:5682 inconsistent therewith.

We are not convinced by plaintiff's argument that Section 4 of Act 549 establishes a new prescriptive period. Act 549 as it amended La.C.C. art. 208 only authorizes the proof of filiation by an unacknowledged illegitimate. La.C.C. art. 209 as amended by Act 549 sets out the methods of proving

3. Marie Louise Harlaux's inheritance was recognized by judgment of possession in "Succession of Vileor Harlaux," No. 2120 on the Docket of the Eighteenth Judicial District Court in and for the Parish of Pointe Coupee, Louisiana, dated January 17, 1939.

that filiation. Paragraph 5 of Article 209 establishes a time period within which a civil proceeding to prove filiation must be commenced. The civil proceeding must be brought "within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, *whichever occurs first.*" (emphasis added)

By providing in La.C.C. art. 209 as amended that the action "must be brought . . . within nineteen years of the illegitimate child's birth," the legislature recognized that prior to the age of majority the child could not bring the action on his own, but that it must be brought for him, and that if same was not commenced by the age of majority, then the illegitimate had one year after reaching majority within which to bring his or her own action. We conclude that the "within six months after the death of the alleged parent" provision is merely the legislature's way of expressing its intention to maintain stable land titles. The legislature could have provided that the action must be brought prior to the death of the alleged parent[4] See *Lalli v. Lalli,* supra.

[1] It must be obvious even to the casual observer that of the two time limitations mentioned in La.C.C. art. 209 as amended, i.e. date of death of the parent and age of the child, only the age requirement is mentioned in Section 4 of Act 549. Thus we are of the opinion that the only intention of the legislature as expressed in Section 4 of Act 549 was to grant a one year grace period to those individuals who were older than nineteen years and could not without the grace period take advantage of Act 549. This does not mean that the six month after death provision was dispensed with during the grace period. This conclusion is reached because there is no

4. See Act 720 of the 1981 Regular Session of the Louisiana Legislature, which amended and reenacted La.C.C. art. 209 to provide that the suit "must be within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs."

mention of the dispensation of the death provision in favor of any child not yet eighteen, nor older than nineteen, who is not afforded the benefits of the grace period. Stated another way, if a child is ten years old, but the alleged parent has been dead for more than six months, then a suit to prove filiation cannot be commenced. We cannot conceive that the legislature would have intended a different result for someone over nineteen years *vis-a-vis* someone under nineteen years.

Though this is a petitory action and not one to prove filiation, theoretically plaintiffs seek to prove the filiation of their father (Adese) to their grandfather (Vileor). Therefore, since the grandfather has been dead for more than six months prior to the commencement of suit, they cannot avail themselves of Act 549.

[2] Conceding arguendo that plaintiffs could avail themselves of Act 549, or even further, that filiation was conceded at the trial of this case, we are of the opinion that the one year limitation provided in Act 549 within which to bring an action to prove filiation does not supercede or replace the prescriptive period as provided in La.R.S. 9:5682.[5] Act 549 authorizes a suit to prove filiation, whereas La.R.S. 9:5682 establishes a time period within which an heir or legatee can bring an action to assert any right, title or interest in any of the property formerly owned by the deceased. La.R.S. 9:5682 presupposes filiation already having been acknowledged or proven, whereas Act 549 authorizes proof thereof. There is no indication that the legislature by the enactment of Act 549 intended the repeal or replacement of La.R.S.

5. By Act 721 of the 1981 Regular Session of the Louisiana Legislature, the legislature repealed Sections 5682, 5683, and 5684 to Title 9 of the Louisiana Revised Statutes and added Sections 5630 and 5631 which reduced the time period within to bring an action to assert any right, title or interest in a succession to two years.

9:5682. Therefore, the trial judge was not in error in sustaining the peremptory exception of prescription.

NO CAUSE OF ACTION

Plaintiffs-appellants contend the trial judge was in error in refusing to apply *Succession of Brown*, supra, retroactively. We disagree. A careful reading of *Succession of Brown* fails to disclose any intent by the Supreme Court that its decision be applied retroactively. We agree with our brethren on the Fourth Circuit that *Succession of Brown* is not applied retroactively. *Succession of Ross*, 397 So.2d 830 (La.App. 4th Cir. 1981).

Inasmuch as we have concluded that this action has prescribed, there is no need for any further discussion of whether plaintiffs have stated a cause of action.

Therefore, for the above and foregoing reasons, the judgment of the trial court is affirmed at appellants' costs.

AFFIRMED.

PONDER, Judge, dissenting.

The question is one of legislative intent.

By holding that Section 4 of Act 549 has no effect upon the requirement that the proceeding be brought within six months of the death of the alleged parent, the majority is interpreting Section 4 as though it read:

> "Any illegitimate child nineteen years of age or older *whose parent shall not be deceased and whose parent shall not die within six months* shall have one year, etc."

Instead, I believe that the legislature intended to remedy

the constitutional defect in our law so as to allow those who had been prevented from making a claim a period of one year to do so, without regard to the date of the parent's death. It is true that this interpretation has the effect of adding to Section 4 some such provisions as, "this proceeding shall not be barred by the fact that the parent shall have been deceased by more than six months." But I would elect to interpret the provision thus so as to right as many wrongs as reasonably possible.

I would not deny this relief simply because the statute would still leave some inequities, such as the case cited of the ten year old whose parent died a year ago. That problem could be addressed by the legislature.

The fears of instability of land titles are more imaginary than real. The gates were opened for only one year, which has now passed. There is no evidence that any flood resulted.

I therefore dissent.

TRIAL COURT OPINION

EDDIE HARLAUX, RONALD HARLAUX, LEON HARLAUX, LIONSL HARLAUX, CECIL HARLAUX and STELLA HARLAUX MANCHESTER

VERSUS

LEROY HARLAUX

NUMBER 16,619 - DIVISION "A"

18th JUDICIAL DISTRICT COURT

PARISH OF POINTE COUPEE

STATE OF LOUISIANA

* * *

REASONS FOR JUDGMENT
NO CAUSE OF ACTION

Plaintiff's opposition to defendant's exception of no cause of action rests on the recently acquired status of illegitimates as a result of the holdings by the Second Circuit Court of Appeals and the Supreme Court in *Succession of Brown*, 379 So.2d 1172 and 388 So.2d 1151, respectively. Those holdings render unconstitutional the Louisiana inheritance scheme whereby illegitimate children are only called to their father's succession in default of legitimate descendants, parents, siblings and other relations. The law of the cases is that the state may not constitutionally deprive illegitimates of the rights enjoyed by legitimates, totally. In the absence of some provision whereby illegitimates may prove descent and thereby claim parity with legitimates, the state action must fall. However, the result of *Brown*, supra, is not to make legal heirs of all legitimates; it merely provides that the state must allow them to prove their descent and step up alongside legitimates. Despite the attractiveness of applying these laws to the facts of this case, there is no justification for it. There is

no indication in the Supreme Court opinion that the ruling should apply to any but successions opened after September 3, 1980 (or at least within the prescriptive periods for attacking succession judgments). Indeed, the Second Circuit has expressly stated in *Herndon v. Herndon*, 388 So.2d 463 (2nd Cir. 1980) that it will not give retroactive effect to *Brown*, supra. Such position is in line with Supreme Court decisions and federal decisions. This Court will not now apply the Brown rule to a succession closed these past forty years or more.

Recognizing that the foregoing is an area ripe for higher court litigation at the option of the parties to this action, the Court further expresses its opinion as to the other issues presented.

Plaintiff's argument that they should be allowed to prove filiation of their father to Vileor Harlaux under the one-year grace period granted in LA. Acts No. 549 of 1980 is inapplicable. That provision has no retroactivity and is limited to children desiring to prove descent from their natural parent. It does not indicate an extension of the right to other descendants or collaterals, nor would the historical background support such argument. The Act was in response to U.S. Supreme Court rulings in *Trimble v. Gordon*, 97 S.Ct. 1459 (1977) and *Lalli v. Lalli*, 439 U.S. 259 (1978) and even extends somewhat beyond those decisions, but not to the extent urged by plaintiffs here. The Legislature was simply making it possible for the State to maintain an orderly inheritance scheme by providing that only those illegitimates who proved filiation within a prescribed period and in the prescribed manner could step into the shoes of legal heirs. Those who did not do so remain irregular heirs to take in their father's succession only ahead of the state.

It should be noted that under LSA-C.C.Art. 949 irregular

heirs do not have the benefit of seizin and are not presumed to accept automatically if minors. Therefore, there is no merit to the argument that these plaintiffs have been co-owners of the disputed property for the last forty years. As for the challenge to the unconstitutionality of Article 949, plaintiffs base their claim upon the aforementioned Equal Protection cases. Article 949 is primarily a procedural statute providing that those whose right to inherit is not obvious must apply to a court for determination of such right. There is no effect on substantive rights to inherit.

For the above and foregoing reasons, this Court finds that these plaintiffs have no cause of action.

PRESCRIPTION

Further addressing the presented issues, this Court turns to the question of the peremptory exception of prescription. The ten-year prescription of LA. R.S. 9:5682 is applicable to the instant case. That statute provides that no action lies after ten years against property acquired from an heir by a third party to the succession. In this case, upon Vileor's death, his property was properly vested in his sister, Marie, as per the statutory scheme in 1938. Neither Adese, Leroy, nor Pearl had any inheritance right superior to Marie's. They were thus not parties to the succession. Leroy acquired the property in dispute here from Marie by donations inter vivos and mortis causa, the latter being in 1951. He has held the property in quiet, uninterrupted possession for the whole period from 1951 until this suit was filed in July, 1980. He has thus completed requirements for continued title in LA. R.S. 9:5682.

As to the argument that co-heirs cannot prescribe against each other, plaintiffs are not co-heirs at all, nor is defendant,

as to Vileor's succession. This matter has been addressed above. However, even if they were considered heirs, LSA-C.C. 1305 provides for thirty-year prescription in favor of a possessing heir where he has enjoyed separate possession to the exclusion of other heirs. In the instant case, plaintiffs have no possession to support a claim of community of possession. The property has been possessed by Leroy and his ancestor in title for over thirty years. Plaintiffs' cause, if it existed, has prescribed.

New Roads, Louisiana, this 2nd day of March, 1981.

/s/Daniel P. Kimball
Daniel P. Kimball, Judge, Division "A"

TRIAL COURT JUDGMENT

EDDIE HARLAUX, RONALD HARLAUX, LEON HARLAUX, LIONEL HARLAUX, CECIL HARLAUX and STELLA HARLAUX MANCHESTER
VERSUS
LEROY HARLAUX
NUMBER 16,619, DIV. "A"
18th JUDICIAL DISTRICT COURT
PARISH OF POINTE COUPEE
STATE OF LOUISIANA

JUDGMENT ON EXCEPTIONS

This cause came regularly for hearing on January 20, 1981, on the exceptions of no cause of action and prescription filed by defendant herein. Present in court:

Keith B. Nordyke and Edward J. Walters, Jr., of Moore and Walters, 850 North Boulevard, Baton Rouge, Louisiana, and Randall J. Cashio, 338 North Eugene Street, Baton Rouge, Louisiana, attorneys for plaintiffs; and

John Wayne Jewell, Jewell & Jewell, New Roads, Louisiana, attorney for defendant/exceptor.

When, after hearing the pleadings, the evidence and the argument of counsel, the court having granted delays for the filing of briefs and the court considering these briefs, the law and the evidence being in favor thereof, for written reasons assigned on March 2, 1981:

IT IS ORDERED, ADJUDGED AND DECREED that the exceptions of no cause of action and prescription be and they are hereby sustained and the plaintiffs' suit is hereby dismissed, at their costs.

JUGMENT READ, RENDERED AND SIGNED in open court at New Roads, Louisiana, this 10th day of March, 1981.

/s/Daniel P. Kimball
Judge, Division "A"

SUCCESSION OF CLIVENS

SUCCESSION OF Viola Alexander CLIVENS.
No. 82-C-0125.
Supreme Court of Louisiana.
July 2, 1982.
On Rehearing Jan. 10, 1983.
Rehearing Denied Feb. 11, 1983.
Additional Reasons for Denying Rehearing
Feb. 17, 1983.

Allegedly acknowledged illegitimate daughter intervened in succession of her alleged father's widow, contending that she was entitled to his half of estate. The Civil District Court, Parish of Orleans, Revius O. Ortique, J., sustained an exception of no cause of action to the intervention, and she appealed. The Court of Appeal, 406 So.2d 790, affirmed, and appeal was again taken. The Supreme Court, Calogero, J., held that: (1) the Supreme Court's *Brown* decision, holding unconstitutional statute barring illegitimate children from inheriting from their natural fathers in same manner as legitimate children, is to be applied retroactively, as relates to testate as well as intestate succession, to effective date of Louisiana Constitution of 1974 as well as prospectively, and (2) intervenor's petition therefore failed to state cause of action.

Original decree vacated; Judgments of the District Court and the Court of Appeal affirmed.

Marcus, J., concurred and assigned reasons.

Dixon, C.J., dissented.

Watson, J., dissented and assigned reasons.

Lemmon, J., dissented, believing that *Succession of Brown* should be applied retroactively without any limitation applicable in this case.

Dennis, J., assigned additional reasons for denying a rehearing.

Dixon, C. J., and Watson and Lemmon, JJ., would grant a rehearing.

1. Courts 100(1)

Louisiana Supreme Court's *Brown* decision, holding unconstitutional succession statute barring illegitimate children from inheriting from their natural fathers in same manner as legitimate children, is to be applied retroactively, as relates to testate as well as intestate successions, to effective date of Louisiana Constitution of 1974 as well as prospectively. (Per Calogero, J., with two Justices joining and one Justice concurring). LSA-C.C. art. 8.

2. Courts 100(1)

Generally, unless decision specifies otherwise, it is to be given prospective and retroactive effect. (Per Calogero, J., with two Justices joining and one Justice concurring.)

3. Courts 100(1)

Retroactivity of decision is not constitutionally required, and states are free to limit retroactivity of their civil decisional law when necessary or advisable. (Per Calogero, J., with two Justices joining and one Justice concurring.)

4. Wills 11

Because of constitutionally required forced heirship, testator is not free to bequeath all his property to whomever he pleases if he leaves descendants; rather, descendants have constitutional as well as statutory right to forced portion. (Per Calogero, J., with two Justices joining and one Justice concurring.) LSA-Const. Art. 12, § 5.

5. Courts 100(1)

Acknowledged illegitimate daughter's petition, alleging legal entitlement to father's succession as father's sole descendant, failed to state cause of action, notwithstanding decision holding unconstitutional statute barring illegitimate children from inheriting from their natural fathers in same manner as legitimate children, where father died prior to date to which limited retroactive application of decision applied. (Per Calogero, J., with two Justices joining and one Justice concurring.) LSA-C.C. art. 919 (Repealed); LSA-Const. Art. 1, § 3; U.S.C.A. Const.Amend. 14.

Nils R. Douglas, John A. Hollister, McNulty, OConnor, Stakelum & Anderson, New Orleans, for applicant.

Roger R. Roy, Franklin V. Endom, Jr., Polack, Rosenberg, Rittenberg & Endom, New Orleans, for respondents.

WATSON, Justice.

The issues are:

(1) Should the decision in *Succession of Brown*[1] be retrospective or prospective?

(2) If prospective, from what date?[2] and,

(3) What exceptions should be made to a prospective application to preserve the rights of litigants similarly situated to those in *Brown*?

George Clivens died on September 24, 1971. His widow, Viola Alexander Clivens, received a judgment giving her possession of his estate on December 17, 1974. The widow died

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1. 388 So.2d 1151 (La., 1980). This author dissented.

2. Since *Brown* was retroactive as to the litigants, the question is not one of pure prospectivity.

October 19, 1978, leaving collateral relatives but no children. A sister was appointed administratrix of the succession. Dorothy Clivens Joseph Vantress, born June 18, 1928, intervened in the succession on July 20, 1979, contending that she was the acknowledged illegitimate daughter of George Clivens and entitled to his half of the estate. The trial court sustained an exception of no cause of action to the intervention. The court of appeal affirmed the trial court judgment, holding that *Succession of Brown* should be applied prospectively from its September 3, 1980, date. *Succession of Clivens*, 406 So.2d 790 (La. App. 4 Cir. 1981). The court relied on its earlier decision in *Succession of Ross*, 397 So.2d 830 (La.App. 4 Cir. 1981). A writ was granted to review the judgment. 411 So.2d 47 (La., 1982).

Succession of Brown, supra, held that Civil Code art. 919[3] denied equal protection to illegitimates in violation of Art. 1, § 3 of the 1974 Louisiana Constitution and the United States Constitution. *Brown* followed *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). *Trimble* held that an illegitimate who has proven filiation must have the same status as a legitimate heir in a state's intestate succession law.[4] *Brown* has been applied retroactively. See *Succes-*

This article has been repealed by Act 1981, No. 919, § 8.

4. Some states have denied retroactive effect to *Trimbl*. An Arkansas court in *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979) cert. denied 444 U.S. 942, 100 S.Ct. 297, 62 L.Ed.2d 309, refused to apply *Trimble v. Gordon* retroactively "to prevent chaotic conditions arising from the lack of title to real property", 583 S.W.2d at 499. Cited in *Frakes* is the Kentucky case of *Pendleton v. Pendleton*, 560 S.W.2d 538 (1968) which refused to apply *Trimble* prior to its effective date of April 26, 1977, "except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation". Also cited is the Tennessee case of *Allen v. Harvey*, 568 S.W.2d 829 (Tenn., 1978) which allowed illegitimates to inherit only prospectively except for "any cases pending in the courts of Tennessee on the date this opinion is released." Illinois and Texas hold that *Trimble* does not require retroactive application. *In Re Estate of Rudder*, 397 N.E.2d 556, 78 Ill.App.3d 517, 34 Ill. Dec. 100 (1979); *Winn v. Lackey*, 618 S.W.2d 910 (Tex.Civ.App. 1981).

sion of Richardson, 392 So.2d 105 (La.App. 1 Cir. 1980), writ denied 396 So.2d 1324 (La. 1981).

New case law has traditionally had retroactive effect, but retroaction is not required by the United States Constitution. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).[5] The states are free to limit the retroactivity of their civil decisional law. *Sunburst Oil & Refining Co. v. Great Northern Railway*, 91 Mont. 216, 7 P.2d 927 (1932), affirmed 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). Legislation usually has only prospective effect. LSA-C.C. art. 8 provides:

> "A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts."

In the judicial area, "[P]rospective overruling is a simple matter of facing up to the reality that things *change*, even fundamental things, and effecting change in a deliberate and rational manner rather than pretending that things were always the way they are now." 51 Va.L.Rev. 204. Generally, unless a decision specifies otherwise, it is given both retrospective and prospective effect.[6] See *Peterson v. Superior Court of Ventura County*, 31 Cal.3d 147, 181 Cal. Rptr. 784, 642 P.2d 1305 (1982).

Two competing interests are involved: (1) the property rights which have been acquired on the basis of the laws denying inheritance rights to illegitimates; and, (2) the unequal treatment that prospective application of *Brown* will cause

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5. "In France ... the *retroactivite des nouvelles jurisprudences* has been considered as *une infirmite du systeme jurisprudentiel.*" 8 Israel Law Reivew 173.

6. "[T]he legislature anticipated that *Succession of Brown* might be retroactive." 41 La.L.Rev. 387.

to those illegitimates in the same situation as the *Brown* plaintiffs. These interests must be weighed to decide whether "the hardship on a party who has relied on the old rule outweighs the hardship on the party denied the benefit of the new rule." 28 Hastings Law Journal 561.

Judicial decisions are denied retroactive effect either to protect people who have relied on the former law and/or to preserve stability in an area where stability is of particular importance. *Brown* overruled a Civil Code article upon which individuals had relief for generations. Legitimate children have been placed into possession of estates, sold, mortgaged and, in some cases, dissipated them. Substantial uncertainty and confusion would result if those who have relied to their detriment on prior law became subject to the claims of illegitimate heirs. However, with intestate successions, the element of detrimental reliance is generally present only as to third parties. *Brown* mandates vast changes in estate and property ownership. The importance of stability in land titles and the reliance on the former law in property transactions favor prospective application.[7]

Weighing against these factors is the unequal treatment which has been afforded illegitimates disinherited by operation of C.C. art. 919. Where there has been infringement of constitutional rights, a beneficent rule righting the wrong should generally be retroactive.

Lovell v. Lovell, 378 So.2d 418 (La., 1979) declared C.C. art. 160 unconstitutional but held that the decision was not retroactive. However, the rights involved in *Lovell* were less

7. *Kirchberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979); affirmed 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) held that LSA-C.C. art. 2404 violated the constitutional guarantee of equal protection. The decision was applied prospectively, save for the litigants, because retroactivity "would create a substantial hardship with respect to property rights and obligations." 609 F.2d 735.

fundamental than those here. *Lovell* relied on *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Chevron* holds that a decision should be applied prospectively when: (1) there is a new principle of law not foreshadowed by past pases; (2) the purpose of the new rule is promoted; and (3) injustice or hardship will result from retroactivity.

In *Gross v. Harris*, 664 F.2d 667 (8th Cir. 1981) the court considered the criteria in *Chevron* with respect to *Trimble*. The court stated:

> "In applying this test to the instant appeals we observe that the first element of the *Chevron* test is present, because *Trimble* was not foreshadowed by previous Supreme Court decisions. Indeed, the prior decisions in *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.E.2d 651 (1976) and *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), would appear to have indicated that a contrary result might be reached in *Trimble*." 664 F.2d 671.

Here, the resolution in *Succession of Brown* was certainly foreshadowed by the decision in *Trimble*. Therefore, the first element of the *Chevron* test is not present.

The court in *Gross* found the second element of *Chevron* missing:

> ". . . It is self evident that the purpose of the *Trimble* decision was to prevent constitutionally impermissible discrimination against illegitimates. Retrospective application of *Trimble* would thus further the *Trimble* purpose. See *Jimenez v. Weinberger*, 523 F.2d 689, 703 (7th Cir. 1975), cert. denied, 427 U.S. 912, 96 S.Ct. 3200), 49 L.Ed.2d 1204 (1976)." 664 F.2d at 671.

Similarly, retrospective application of *Brown* would further the *Brown purpose* of preventing discrimination against illegitimates. Judge Schott's dissenting opinion in the Court of Appeal correctly analyzed this point:

> "The purpose of the rule announced in *Succession of Brown*, supra was to remove the unconstitutional discrimination against illegitimates imposed by C.C. Art. 919. Among the rights of legitimate children, of whicch acknowledged illegitimates were deprived by Art. 919, was the right to assert a claim as an heir long after a judgment of possession was rendered, C.C. Art. 1030. By refusing to apply the rule of *Succession of Brown* retroactively, the primary purpose of the decision, i.e., putting an end to the discrimination against acknowledged illegitimates, is defeated. Thus, I have concluded that a consideration of the second factor of the *Chevron Oil Company* case dictates the opposite conclusion than that reached by my colleagues in *Succession of Ross*." 460 So.2d at 792.

Third, the *Gross* court found no impermissible injustice or hardship from a limited retroactive application of *Trimble*. Finding two of the three elements favoring prospectivity not present, the *Gross* court made a limited retrospective application of *Trimble*. Here, if claims against third parties and testate successions are excluded, no impermissible hardship will result from retroactive application of *Brown*. Thus, unlike *Lovell*, all three *Chevron* factors favor limited retroactivity.

Brown affects not only Civil Code article 919, but other articles governing Louisiana successions. Because of the far reaching effect of the decision and the uncertainty it has engendered in many areas, it is essential that its complete implementation be prospective. This does not, however, prevent certain limited retroactive exceptions. A new rule "may be retrospective, partially retrospective, or prospective." *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 at 854 (1966). "Definitions of past transactions to which a new rule applies may . . . vary in detail." Aldisert, *The Judicial Process*, "Prospectivity or Retrospectivity?", at page 900.

The rights of third parties can be fully protected if *Brown* is made prospective as to all third parties' interests. Third parties are governed by the declared law at the time they acquired their interests. *Lyons v. Veith*, 170 La. 915, 129 So. 528 (1930).

Limiting the retroactive effect of *Brown* to rights against coheirs in intestate successions would best balance the equities involved. An heir who has acquired title through the law regulating intestate successions must yield to a later interpretation of that law. 47 Harvard Law Review 1409. See *Pierce v. Pierce*, 46 Ind. 86 (1874) and *Jackson v. Harris*, 43 F.2d 513 (10 Cir. 1930). Hence, *Brown* will be retroactive as to co-heirs in intestate successions and prospective as to third parties and testate successions. This is consistent with *Trimble*, which concerns intestate successions.

Since *Brown* relied on the Louisiana Constitution, it is arguable that it should be prospective from the Constitution's effective date. However, it is doubtful that the constitutional provision prohibiting discrimination on the basis of birth was intended to apply to inheritance by illegitimates. The equal protection guarantee in the Louisiana Constitution ". . . is probably best understood in light of the federal equal protection analysis which provided the background for the debate." 35 La.L.Rev. 8.[8] The debate indicates that the lan-

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8. The transcripts of the 1973 Louisiana Constitutional Convention for August 29, reflect that delegate Roy was asked about discrimination on the basis of birth and answered:

"We mention birth because in the past the state has discriminated against legitimate and illegitimate children with respect to aid to dependent children. We felt that we wanted that clearly understood, that in certain categories, whether you're legitimate or illegitimate should not allow state discriminatory practices against you." (Pages 62-63)

Delegate Pugh later noted that:

"I suggest to you that the language relating to birth, to race, to age, to sex, to social origin, to physical condition, to political, religious ideas, has each and every one been already considered and found to be viable under the Fourteenth Amendment to the Constitution of the United States." (Pages 97-98)

guage of the article, although more specific than the federal, was intended to embody federal constitutional standards. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288, rehearing denied 402 U.S. 990, 91 S.Ct. 1672, 29 L.Ed.2d 156 (1971) held that Louisiana Civil Code article 919 did not violate constitutional guarantees. *Trimble*, which cast doubt on *Labine*, was decided after January 1, 1975, the effective date of the Louisiana Constitution of 1974. Thus, the federal jurisprudence relating to illegitimates at the time indicates the Louisiana constitutional provision did not necessarily envision inheritance rights by illegitimates. The effective date of the Louisiana Constitution of 1974 would not be appropriate as a point of demarcation between prospective and retroactive application of *Brown*. Also, since *Trimble* did not specifically overrule *Labine*, *Trimble's* date is inappropriate. See 42 La.L.Rev.468.

When a judgment of a court changes a rule, "the date of that opinion is the crucial date". *Linkletter v. Walker*, supra, 381 U.S. at 639, 85 S.Ct. 1743, 14 L.Ed.2d at 614 (1965). Therefore, the prospective full implementation of *Brown* applies to causes of action arising after its decision of September 3, 1980.

Prior to September 3, 1980, acknowledged illegitimates or those who have proven filiation do not have the status of forced heirs in testate succession. Any claims against third parties by illegitimates based on *Brown* arising before that date are barred. In the interest of preserving the stability of land titles, all third parties are protected. Transferees, mortgagees, and succession debtors who acted in good faith reliance on the prior law are not subject to retroactive claims by illegitimates.

An acknowledged illegitimate or one who proves filiation has, under *Brown*, the same rights as a legal heir. However,

those rights are only partially retroactive. Retroactive claims against third parties and testate successions are precluded. In the interest of justice and equal treatment, *Brown* is to be retroactive in intestate successions where the rights of third parties are not involved.

Plaintiff's claim is not barred. Her suit has never been considered, much less decided. Were she a legitimate heir, her suit would not have prescribed. A succession judgment of possession is subject to amendment. Since plaintiff is alleged to be an acknowledged illegitimate, the problem of proving filiation apparently does not arise. LSA-C.C. art. 203.[9] Act 549 of 1980[10] appears inapplicable.

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9. LSA-C.C. art. 203 provides:

"The acknowledgement of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth od baptism of such child."

10. Act 549 of 1980 provides:

"To amend and reenact Articles 208 and 209 of the Louisiana Civil Code and to repeal Articles 210 and 212 of the Louisiana Civil Code to provide for proof of filation by illegitimate children, or presumption of filation on their behalf; to provide a procedure and time limitations for proceedings to establish filiation; to provide for the method and standard of proof in such actions; to provide that failure to institute timely such a proceeding shall bar the claims of such persons in the successions of their alleged parents; and to provide otherwise with respect thereto.

"Be it enacted by the Legislature of Louisiana:

"Section 1. Articles 208 and 209 of the Louisiana Civil Code are hereby amended and reenacted to read as follows:

"Art. 208. Authorization to prove filiation. Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation.

"Art. 209. Methods of proving filiation. 1. An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this Article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.

"2. A child who is shown to be the child of a woman on an original certificate of birth is presumed to be the chil dof that woman, though the contrary may be shown by a preponderance of the evidence.

"3. An illegitimate child not shown as the child of a woman on an origi-

An acknowledged illegitimate, like plaintiff, whose rights have not previously been litigated, can assert those rights against other heirs in an intestate succession. Any inheritance claims of plaintiff lie solely against her father's other heir, his wife. Since the estate of the wife is intact, under administration, plaintiff retains a cause of action against that estate.[11]

For the foregoing reasons, the judgment is reversed and the matter is remanded for further proceedings.

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nal certificate of birth may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the illegitimate child of that woman.

"4. A child of a man may prov filiation by any means which establish, by a preponderance of the evidence, including acknowledgement in a testament, that he is the child of that man. Evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time when the child was conceived creates a rebuttable presumption of filiation between the child and the alleged father.

"5. Proof of filiation must be made by evidence of events, conduct, or other information which occurred during the lifetime of the alleged parent. A civil proceeding to establish filiation must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, unless there is a presumption of filiation as set forth in Section 2 above. If no proceeding is timely instituted, the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts.

"Section 2. Articles 210 and 212 of the Louisiana Civil Code are hereby repealed:

"Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Louisiana Constitution of 1974.

"Section 4. Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred."

11. It is alleged that certain real property has been mortgaged. If so, the mortgage holder is fully protected under this decision.

REVERSED AND REMANDED.

MARCUS and DENNIS, JJ., dissent and assign reasons.

CALOGERO, J., dissents for reasons assigned by DENNIS, J.

MARCUS, Justice (dissenting).

I do not consider that *Succession of Brown* should be applied retroactively to co-heirs in intestate successions. In my view, *Succesion of Brown* should only be applied prospectively from September 3, 1980, the date the decision was rendered. Hence, plaintiff's claim in the instant case would be barred. Accordingly, I respectfully dissent.

DENNIS, Justice, dissenting.

I respectfully dissent.

The majority opinion declares that article 919 of the Civil Code never existed for some illegitimates, yet governed for over a hundred years for others. At the same time, my brethren have simply disregarded the deliberate mandates of our state constitution and the recent jurisprudence of this Court to devise their own rules regulating the property rights of illegitimates.

The majority opinion ignores the clear words of our state charter and previous decisions of this court in assuming that Article 1, § 3 of our 1974 constitution merely codifies federal jurisprudence. Article 1, § 3 of our state constitution prohibits laws which "unreasonably discriminate against a person because of [his] birth * * *" In the constitutonal debates, both proponents and opponents of the provision noted that it included within its scope unreasonable discrimination against persons because of illegitimacy.[1] *Succession of Robins*, 349

1. State of Louisiana, Constitutional Convention of 1973, Verbatim Transcripts (39 Volumes; 1973-1974) at 12 Proceedings (38th day, August 29) 57, 62, 63, 76, 90.

So.2d 276 (La. 1977). After a previous review of the proceedings of the convention, this Court rejected the argument that the provision was aimed only at discrimination in aid to dependent children programs, and held that "the entire range of discriminatory practices based on illegitimacy was encompassed by the section." *Succession of Thompson*, 367 So.2d 796, 798 (La. 1979). The holding that "[t]he members of the constitutional convention intended this article to include within its scope unreasonable discrimination based upon illegitimacy" was reaffirmed by a five member majority of this Court last term. *Succession of Brown*, 388 So.2d 1151 (La. 1980).

The majority is mistaken in concluding that the effective date of our state constitution is not an appropriate point of demarcation in the existence of Article 919 of the Civil Code. In *Succession of Brown, supra*, a five member majority of this present court during its 1980-81 term held that Article 919 of the Civil Code, which denies inheritance rights to acknowledged illegitimates in the succession of a father who is survived by other relatives, conflicts with Article 1, § 3 of our state constitution because it arbitrarily, capriciously or unreasonably discriminates against a person because of his birth. Since laws which were in conflict with the 1974 Louisiana Constitution ceased upon its effective date, Article 919 was repealed at midnight on December 31, 1974. La. Const. 1974, art. 14 §§ 18(B), 35.

This court has on at least two other occasions construed Article 14 § 18(B) of the constitution to repeal statutes in conflict with the constitution upon its effective date. *State v. James*, 329 So.2d 713 (La. 1976); *Civil Service Commission of N.O. v. Foti*, 349 So.2d 305 (La. 1977). The constitutional history of Article 14 § 18(B) which was first placed in a Louisiana constitution to automatically repeal Reconstruction

legislation, indicates that it means what it says and that laws in conflict with self executing provisions of the new constitution are thereby repealed. E.S. Smith, "If Words Mean What They Say," unpublished manuscript, Louisiana Constitutional Law Seminar, L.S.U. Law Center (1981); Vol. IX Records of La. Const. of 1973; Convention Manuscripts p. 3484, T. J. Kernan, The Constitutional Convention of 1898 and its Work, Report to the La. Bar Assn., 1898, 1899, p. 55. Article 1, § 3, which prohibits discriminatory laws based on a person's birth, is clear, express and self executing, and this court should hold that Article 919 of the Civil Code ceased upon its effective date of December 31, 1974 at midnight.

On the other hand, except as otherwise specifically provided in the constitution, the constitution is not retroactive and does not create any right which did not exist under the constitution of 1921 based upon actions or matters occurring prior to the effective date of the 1974 constitution. Id. art. 14, § 26. Since there is no specific provision to the contrary in the 1974 constitution, and since the 1921 constitution did not prohibit laws which discriminate on the basis of birth, Article 919 was valid and effective insofar as state constitutional law is concerned until its repeal or cessation at midnight on December 31, 1974 as to matters or actions accruing prior to that date.

The intervenor's cause of action, which arose upon the death of her father on September 24, 1971, is a matter or action which occurred before the 1974 constitution's effective date. Accordingly, the 1974 constitution did not prevent the application of Act 919 of the Civil Code to it. Since Article 919 excludes acknowledged illegitimates from participating in the succession of their father when he is survived by a spouse, it effectively barred intervenor's action unless it was invalid under the federal constitution at the time the action arose.

The United States Supreme Court, on March 29, 1971, held that there is "nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this court to nullify the deliberate choices of the elected representatives of the people of Louisiana" in enacting Article 919 of the Civil Code. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). etition for rehearing was denied May 17, 1971, 402 U.S. 990, 91 S.Ct. 1672, 29 L.Ed.2d 156 (1971). In rejecting the attack on Article 919, the high court recognized that the "power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property" is committed to the state legislature. Id. 401 U.S. at 538, 91 S.Ct. at 1021. It was not until April 26, 1977, in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), that the Supreme Court clearly adopted a different analysis with respect to illegitimates' property rights. The court held that Illinois' distinction between legitimate and illegitimate children for purposes of intestate successions could not be justified on the bases of the state's interest in promoting legitimate family relationships or the state's interest in establishing a method of property disposition, but it did not expressly overrule *Labine* or make its decision in *Trimble* specifically retrospective. Instead, it merely recognized that *Labine* "is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." Id. n .12.

George Clivens died on September 24, 1971 some four months after *Labine* became final and over five and one-half years before *Trimble* was decided. During the interim Louisiana adopted its 1974 constitution which specifically prohibits discrimination on the basis of birth. Thus, Louisiana reformulated its basic view of the rights of illegitimates during the same period that the Supreme Court recast its own analysis. In *Trimble*, the high court saw its judicial task as

"one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." Id. 430 U.S. at 771, 97 S.Ct. at 1465. Consequently, since Louisiana actually anticipated the Supreme Court in fulfilling its responsibility, I do not think that *Trimble* compels us to declare Article 919 unconstitutional as of a date earlier than our own 1974 constitution.

Certainly, the expressions of *Trimble*, which at least one member of the court now considers to be a "derelict", *Lalli v. Lalli*, 439 U.S. 259, 277, 99 S.Ct. 518, 529, 58 L.Ed.2d 503, 516 (1978) (Blackmun, J., concurring), do not require us to make the United States Supreme Court rulings retroactive as to a succession opened in 1971 a few months after its decision in *Labine*, and much less do they require absolute retroactivity as the majority opinion dictates. All other state supreme courts which have considered the issue have applied *Trimble* prospectively, although some have given it limited retroactivity to actions pending at the time the state case or *Trimble* was decided. See cases cited in the majority opinion at **fn. 4.**

In addition to there being no necessity for an absolute retrospective declaration of Article 919's unconstitutionality, the majority opinion's disparate treatment of illegitimates according to whether their parent's property is in the possession of an intestate or testate succession, or a third party raises further equal protection questions. A plurality of the United States Supreme Court in *Lalli v. Lalli, supra*, approved a carefully considered procedural statute which seeks to grant to illegitimates insofar as practicable rights of inheritance on a par with those enjoyed by legitimate children while protecting the important state interest in the just and orderly disposition of decedents' estates. The Louisiana legislature has already adopted similar procedural legislation de-

signed to further these purposes. The majority opinion goes much further and completely excludes the substantive rights of certain illegitimates to claim under their parents' estates. This was the feature of the Illinois statute declared unconstitutional in *Trimble* which distinguished it from the New York law, i.e., "[T]he Illinois statute was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes." *Lalli*, 439 U.S. at 273, 99 S.Ct. at 527. Because of our statutory law establishing procedural safeguards, the majority's disparate retroactivity rule reaches far in excess of its justifiable purposes and will fall unfairly and unequally upon illegitimates according to the situations in which they find themselves.

For all of these reasons, I believe the more just and legally justifiable solution to the problems presented by the expansion of illegitimates' property rights in Louisiana is to adhere to the rule of our state constitution under which Article 919 of the Civil Code regulated the inheritance of natural children from their natural fathers until the article ceased to exist on the effective date of the 1974 Louisiana Constitution.

On Rehearing

CALOGERO, Justice.

Louisiana Civil Code article 919, enacted in 1908, and repealed in 1981, barred illegitimate children from inheriting from their natural fathers in the same manner as legitimate children. In *Succession of Brown*, 388 So.2d 1151 (La. 1980), we affirmed a Court of Appeal judgment holding that La.C.C. art. 919 was unconstitutional. On original hearing in the present case, we held that *Succession of Brown* would be ap-

plied retroactively as to coheirs in intestate successions, and prospectively from the date of its rendition, September 3, 1980, in testate successions and as to third parties. We were prompted to grant this rehearing by the argument, among others, that our original opinion creates more problems than it solves.

The issue, whether *Brown* should be applied retroactively, and if so, to what extent, arises essentially in the following context. The acknowledged illegitimate daughter of George Clivens, one Dorothy Clivens Vantress, brought an action against her father's widow, Viola Alexander Clivens, who had been placed in possession of George Clivens' property after his September 24, 1971 death.[1] Vantress contends that she is legally entitled to the property because she was her father's sole descendant.

The trial court sustained an exception of no cause of action to Vantress' claim and the Court of Appeal affirmed that ruling, holding that *Succession of Brown* should be applied prospectively only from the date of its rendition.

After reversing the Court of Appeal on original hearing we granted this rehearing because of concern over the following arguments: (1) unlimited retroactive application of *Brown* as against co-heirs in intestate successions would work a substantial injustice, especially in cases from years past where the heir has either already disposed of his inheritance or relied on his ownership of the property to his detriment; (2) the disparate treatment between testate and intestate succesions has no reasonable basis. Denial of an heir's forced portion (which is Constitutionally provided, La. Const. art.

1. The action brought by Dorothy Clivens Vantress was, more precisely, an intervention in Viola Clivens' succession proceedings, but the exact procedural posture of the case is not pertinent to our consideration of the legal issue.

XII, § 5) is no less discriminating than denial of heirship rights in intestate successions; (3) future determinations of just who are "third parties" is problematic, extending rather than shortening the disruptive effect on land titles. And allowing the legal heir/vendor to be called to account for the proceeds of a sale of his ancestor's property (a distinct possibility under the original opinion) imposes the same inequitable considerations that exist in unlimited retroactive application of *Brown* in intestate successions; and (4) the combined effect of these problems is that the state's interest in quieting or minimizing disruptive land title disputes is hindered rather than furthered by such a resolution of the retroactivity issue.

[1] For the reasons which follow, we now hold that *Succession of Brown*, holding La.C.C. art. 919 unconstitutional, is to be applied retroactively, as relates to testate as well as intestate successions, to January 1, 1975, the effective date of the Louisiana Constitution of 1974, as well as prospectively.

Sydney Brown died intestate on January 1, 1978. He was survived by four acknowledged illegitimate children and one adopted child. In the succession proceedings a judgment of possession was rendered in favor of the adopted child. His illegitimate children brought suit to have the judgment of possession annulled. The trial court, following La.C.C. art. 919, ruled against the illegitimate children, refusing to nullify the judgment of possession.[2]

In affirming the Court of Appeal judgment, we held that La.C.C. art. 919 was unconstitutional in that it unreasonably

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2. La.C.C. art. 919, before its repeal in 1981, provided:

Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State.

In all other cases, they can only bring an action against their natural father or his heirs for alimony, the amount of which shall be determined, as directed in the title: *Of Father and Child*.

discriminated against illegitimate children by denying them the same inheritance rights in the successions of their fathers, under any circumstances, as was enjoyed by their legitimate counterparts. In doing so, we relied upon the United States Supreme Court case of *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), *and* Article I, Section 3 of the Louisiana Constitution of 1974.

The question of whether the decision in *Succession of Brown* would be applied retroactively was left unanswered in that opinion.[3] The dispute in this litigation requires that that question now be answered.

[2, 3] As correctly pointed out in our opinion on original hearing, generally, unless a decision specifies otherwise, it is to be given prospective *and* retroactive effect. However, retroactivity is not constitutionally required and states are free to limit the retroactivity of their civil decisional law when necessary or advisable. We have previously held that "where a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding the 'injustice or hardship' by a holding of nonretroactivity. *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969)." *Lovell v. Lovell*, 378 So.2d 418 (La. 1979). The United States Supreme Court itself described its task in *Trimble* as "one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." *Trimble v. Gordon*, 430 U.S. at 771, 97 S.Ct. at 1465. Consequently we must weigh and balance the competing interests involved. The vindication of the illegitimate child's constitutional right to inherit from his natural parents in the same uanner as his legitimate siblings must be weighed against inequities which might result from affording

3. The holding in *Brown* was however made applicable to the litigants in that case.

the man ownership interest, and against the state's interest in maintaining the stability of land titles.

In *Lovell v. Lovell, supra,* this Court, relying on *Chevron Oil Company v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), noted the factors which should be considered in determining whether a decision should be made nonretroactive. We stated:

> (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the merits and demerits must be weighed in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective application will further or retard its operation; and (3) the inequity imposed by retroactive application must be weighed.

We will consider these three factors in light of the Louisiana constitutional provision upon which we relied in *Succession of Brown* to find that La.C.C. art. 919 was unconstitutional.

Article I, Section 3 of the Louisiana Constitution, adopted by the people of Louisiana in 1974 and effective January 1, 1975 provides in pertinent part:

> No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth . . .

As noted in *Brown,* in the constitutional debates over this provision, both proponents and opponents noted that it included within its scope unreasonable discrimination against a person because of illegitimacy.[4] *Succession of Thompson,*

4. State of Louisiana, Constitutional Convention of 1973, Verbatim Transcripts (39 Volumes; 1973-1974) at 12 Proceedings (38th day, August 29) 57, 62, 632, 76, 90.

367 So.2d 796 (La. 1979); *Succession of Robins*, 349 So.2d 276 (La. 1977). We have previously spoken on the meaning of this Constitutional provision. After reviewing the proceedings of the convention, we determined that "the entire range of discriminatory practices based on illegitimacy was encompassed by the section." *Succession of Thompson, supra.*

Accordingly, in considering, under the *Lovell-Chevron* factors, whether the decision in *Succession of Brown* was one of first impression whose resolution was not clearly foreshadowed, we conclude that at a minimum it was clearly foreshadowed. Article I, Section 3 of the 1974 Constitution specifically prohibits arbitrary discrimination against a person because of birth. In our constitution, we intentionally went further in our expressions of equality for all persons, than is provided in the United States Constitution or in the 1921 Louisiana Constitution. To say now that the decision in *Brown* was not foreshadowed by the 1974 Louisiana Constitutional provision is to ignore its existence.

Furthermore, we have previously utilized this very provision to find unconstitutional other statutes which unreasonably discriminated against illegitimates. *Succession of Thompson, supra; Succession of Robins, supra.*[5] The provision, thus, has not been ignored. Rather, it has been consistently applied by this Court as intended, clearly foreshadowing the result reached in *Brown.*

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5. Neither *Succession of Thompson* nor *Succession of Robins* dealt with the same codal article that we dealt with in *Succession of Brown*, but they did both deal with discrimination against illegitimates.

In *Succession of Thompson*, we held that La.C.C. art. 1483, which prohibited an acknowledged illegitimate child from being a legatee of his mother if she had other legitimate children, was unconstitutional under La. Const. art. I, § 3.

In *Succession of Robins*, La.C.C. art. 1488 was held constitutionally infirm under La. Const. art I, § 3, because it prohibited a natural parent from bequeathing any substantial part of his estate to a child (more than what was necessary for sustenance or to procure an occupation or profession) if the child's conception resulted from the parent's adultery.

As relates to the second prong o fthe *Lovell-Chevron* test, whether a holding of retroactive application will further or retard the purpose and effect of the rule fashioned in the judicial decision, we conclude that the retroactive application of *Brown* will surely further its holding, and a prospective application would just as surely retard it. As stated above, *Brown* held that La.C.C. art. 919 was unconstitutional under La. Const. art. I, § 3. To apply that holding only prospectively from the date of its rendition, September 3, 1980, is to ignore the Constitutional proscription effective in the State since January 1, 1975.

The 1974 Constitution is a recent expression of the will of the people, and its operation and effect is only served by recognizing its provisions and enforcing them.

The holding in *Brown*, insofar as it relied on Article I, section 3 of the 1974 Constitution, was an acknowledgement of the rights of illegitimates and an expression by the Court that arbitrary discrimination, as is implicit in La.C.C. art. 919, is constitutionally prohibited. Therefore, the purpose and effect of that holding can only be furthered by a retroactive application of the decision to the effective date of the Constitution.

As pointed out in disent by Judge Schott to the Court of Appeal opinion in this case (406 So.2d 790), we are not here confronted with the same considerations as were presented to the United States Supreme Court in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), wherein the Court was faced with the question of whether *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), was to be applied retroactively. In *Mapp*, the Court had held that the exclusionary rule would be applicable to the states.[6] The

6. The exclusionary rule is essentially a rule that provides for the exclusion from a criminal prosecution of evidence obtained in violation of the Constitution. It was deemed the only effective means of preventing actions by law enforcement personnel which violated one's constitutional rights.

primary purpose of the exclusionary rule was to deter lawless action. That purpose would clearly not be furthered by retroactive application to an act that had already taken place, nor would the purpose be retarded by only prospective application. Thus the Court in *Linkletter* chose to apply *Mapp* only prospectively. However, in the present case, the purpose of our ruling in *Brown* is to vindicate and recognize the constitutional rights of illegitimates. Thus, unlike *Linkletter*, that purpose is both furthered by a retroactive application and retarded by simply a prospective application.

Finally, we consider the third prong of the *Lovell-Chevron* test, the weighing of inequities which will result from a retroactive application. Primarily we are here concerned with the overall stability of land titles, as well as co-heirs who have relied on their ownership of property, perhaps to their detriment, and third parties who have bought property ignorant of the existence of illegitimates in successions forming part of the chain of title.

First, it must be pointed out that, because of prompt action by our Legislature in this area, instances in which land titles are likely to be adversely affected have been minimized. In fact, as will be discussed below, any actions by unacknowledged illegitimates to prove their filiation or any claims against third parties, made viable by a retroactive application of *Succession of Brown*, must have already been filed, or are now prescribed.

Cognizant of the Court of Appeal decision in *Succession of Brown*, holding that La.C.C. art. 919 was unconstitutional, and anticipating our affirming that decision, the Legislature passed Act No. 549 of 1980, amending Civil Code articles 208 and 209 on proof of filiation of unacknowledged illegitimates.

These articles were again amended by Act No. 720 of

1981 and La.C.C. art. 209 now provides in pertinent part as follows:

> The proceedings required by this Article [proof of filiation] must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted the child may not thereafter establish his filation.
>
> * * * *
>
> Section 2. Any person against whom the time period provided in this Act would otherwise have accrued except for the provisions of this Section shall have one year from its effective date to bring a proceeding to establish filiation of a child. If no such proceeding is timely instituted, such filiation may not therafter be established.

The effective date of the provision was September 11, 1981. Thus unacknowledged illegitimate cchildren who were otherwise prohibited from bringing an action to prove filiation by this statute, were given until September 11, 1982 to file such an action. If such a lawsuit has not been filed prior to that date, "filiation may not thereafter be established." Therefore, the feared onslaught of endless claims that would be made if *Succession of Brown* is applied retroactively will not occur. For an unacknowledged illegitimate to gain the advantage of a retroactive application of *Brown*, he must have at least filed a lawsuit asserting his filiation on or prior to September 11, 1982. It is unlikely there exists a multitude of such pending lawsuits in our state court system. And in any event, all such live efforts to prove filiation are determinable.

As has been properly pointed out, the filiation amendments to articles 208 and 209 apply only to unacknowledged illegititimates. Acknowledged illegitimates are under no simi-

It has been argued that the Legislature might grant illegitimates another grace period, as they did in the second amendment to La.C.C. art. 209 (Act No. 720 of 1981)[8] and thus the claims which might be asserted by illegitimates could in fact be endless. We find no merit in that argument.

The Legislature granted a second grace period in Act No. 720 of 1981 because of the inadequacies present in the grace period provision of Act No. 549 which, perhaps, threatened the constitutionality of the entire statute. The amendment was not motivated simply by Legislative whim and we find nothing to support the argument that another grace period will be enacted. Furthermore, a strong argument can be made that such a provision, granting another grace period for illegitimates to bring a filiation suit, would be invalid. *See*, Spaht, *Establishing the Filiation of Illegitimate Children*, 42 La.L.Rev. 403 (1982).

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8. La.C.C. art. 209 was originally amended in 1980 by Act No. 549. The main provisions of the act were essentially the same as those of Act No. 720, with the exception that the illegitimate was given only six months after the death of the alleged parent to bring his filiation action instead of one year as provided in Act No. 720. However the grace period provided in Act No. 549 was substantially different from the one provided in Act [illegible] provided:

> Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate shall be forever barred.

As is apparent, the meaning of the provision is not clear. It has been argued that the provision only extends a grace period to those over nineteen whose alleged parent is still living. On the other hand, from a literal reading of the provision, it also extends the one year grace period to illegitimates over nineteen regardless of when their alleged parent died. Obviously, there is no rational reason for allowing an illegitimate over nineteen whose alleged parent died ten years ago, one year to bring an action, and to deny the one year period to an illegitimate who is under nineteen and whose alleged parent may have died only one year ago.

Therefore, because of the ambiguities in the provision, the Legislature granted another one year grace period in Act No. 720 of 1981, granting the grace period to all illegitimates adversely affected by the Act.

As stated earlier, we were prompted to grant the rehearing by arguments relating to certain aspects of our original opinion.

In our original opinion, we drew a distinction between testate and intestate successions. It was argued on rehearing that such a distinction does not fully rectify the unconstitutional discrimination against illegitimates that has existed. There is, of course, merit in this argument.

[4] Because of the unique nature of Louisiana Succession Law, which Constitutionally requires forced heirship (La. Const. art. XII, § 5), a testator is not free to bequeath all his property to whomever he pleases if he leaves descendants. Descendants have a constitutional, as well as a statutory, right to a forced portion. To deny an illegitimate descendant a forced portion in a testate succession, while affording a legitimate descendant such a right, is as constitutionally impermissible as denying an illegitimate child his right in an intestate succession. There is no basis for making such a distinction and such a holding fosters rather than remedies dscrimination against illegitimates.

Again, as stated above, because of La.C.C. art. 209 and La.R.S. 9:5630, the treatment of testate successions in the same manner as intestate successions will not foster a significant amount of litigation. And in any event, an illegitimate descendant who does bring such a claim (in a testate succession) has only an action for a forced portion.

It has also ben argued on rehearing that our original determination that *Brown* should be applied retroactively without limit in intestate successions will seriously prejudice persons who were placed in possession of property many years ago and have relied on their ownerhip interests in the property to their detriment. Further, it has been argued that

cession of Brown does not apply, states no cause of action. The rulings of the district court and the Court of Appeal sustaining the exception of no cause of action will therefore be affirmed.

Decree

For the foregoing reasons, our original decree is vacated. We affirm the judgments of the Court of Appeal and the trial court sustaining the exception of no cause of action to Dorothy Clivens Vantress' claim.

ORIGINAL DECREE VACATED; JUDGMENTS OF THE DISTRICT COURT AND THE COURT OF APPEAL AFFIRMED.

DIXON, C.J., dissents.

MARCUS, J., concurs and assigns reasons.

WATSON, J., dissents and will assign reasons.

LEMMON, J., dissents, believing that Succession of Brown should be applied retroactively without any limitation applicable in this case.

MARCUS, Justice (concurring).

I consider that *Succession of Brown* should only be applied prospectively from September 3, 1980, the date the decision was rendered. Hence, plaintiff's claim in the instant case would be barred. Accordingly, I concur in the result reached in this case.

WATSON, Justice, dissenting.

The original opinion represents the fairest and most equitable resolution of the problems created by *Succession of Brown*, 388 So.2d 1151 (La. 1980).

The majority errs in stating that the original resolution of the retroactivity question in *Clivens* creates problems which are contrary to the state's interest in quieting or minimizing disruptive land title disputes. *Brown*, a decision in which the writer dissented, created whatever problems there are. However, after *Brown* was decided, its only logical extension was to make it retroactive but not effective as to third parties. If there really are formidable problems, the proper remedy is not retroactivity to the effective date of the Louisiana Constitution of 1974, but prospective application from the effective date of the decision in *Brown*. The majority on rehearing ignores problems in land titles for the period from 1975 to *Brown*.

The majority overlooks the fact that applying different rules to belated claims of heirship depending on whether the claimants are legitimate or illegitimate constitutes a clear present discrimination against illegitimates contrary to the holding of the United States Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

While Art. 1, § 3 of the Louisiana Constitution proivdes that "[n]o law shall arbitrarily, capriciously or unreasonably discriminate against a person because of birth . . .", it is clear from the transcripts of the convention, quoted in part in footnote 8 of the original opinion, that the constitutional delegates di dnot intend to grant illegitimates any rights greater than those accorded by the federal jurisprudence at the time.

If an arbitrary line is to be drawn for the retroactive application of *Brown*, the decision date in *Trimble* is more appropriate than that of the 1974 Louisiana Constitution. Without the decision in *Trimble*, *Succession of Brown* would have been decided otherwise, despite the language of the 1974 Constitution.

I respectfully dissent for these reasons and adhere to the views expressed in the original opinion.

DENNIS, Justice, assigning additional reasons for denying a rehearing.

In our opinion on rehearing, we held that Article I, Section 3 of the Louisiana Constitution of 1974 foreshadowed the United States Supreme Court decision in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). We held that our constitution intentionally went further in our expression of equality for all persons than is explicitly provided in the United States Constitution or in the 1921 Louisiana Constitution.

In so doing, we have partially vindicated the rights of Louisiana Citizens who adopted a constitution in 1974 which was drafted and ratified with the intention of guaranteeing to Louisianians a heightened degree of liberty and protection in certain categories of rights than those recognized under the United States Constituion.

Under our analysis, it is only logical that the effective date of the 1974 Constitution would serve as the date from which application of *Succession of Brown*, 388 So.2d 1151 (La. 1980) would begin, since on that date Article 919 of our Civil Code was automatically repealed, La. Const. Art. 14, §§ 18(B), 35, whereas it had previously been operative and constitutional. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971).

lar compulsion to sue within a time frame to establish filiation.

However, the Legislature also passed Act No. 721 of 1981, amending La.R.S. 9:5630, reducing from ten to two years the time within which a judgment of possession may be challenged once property passes into the hands of a "third person." La.R.S. 9:5630 provides:

> A. *An action* by a person who is a successor of a deceased person, and who has not been recognized as such in the judgment of possession rendered by a court of competent jurisdiction, *to assert an interest in an immovable* formerly owned by the deceased, *against a third person who has acquired an interest in the immovable by onerous title* from a person recognized as an heir or legatee of the deceased in the judgment of possession, or his successors, *is prescribed in two years* from the date of the finality of the judgment of possession.
>
> B. This Section established a liberative prescription, and shall be applied both retrospectively and prospectively; however, any person whose rights would be adversely affected by the passage of this Section, shall have one year from the effective date of this Section within which to assert the action described in Subsection A of this Section and if no such actio nis instituted within that time, such claims shall be forever barred.
>
> C. "Third person" means a person other than one recognized as an heir or legatee of the deceased in the judgment of possession. (Emphasis provided)

The effective date of this provision was also September 11, 1981. Therefore, all third parties who have purchased property in reliance on prior judgments of possession and who would otherwise be adversely affected by a retroactive application of *Succession of Brown* are protected if no suit was filed before September 11, 1982.

In light of these two provisions, La.C.C. art. 209 and La.R.S. 9:5630, the argument that retroactive application of *Succession of Brown* will seriously disrupt land titles for a prolonged period of time has no merit. Any actions by unacknowledged illegitimates to establish their filiation or any claims against third parties, made viable by a retroactive application of *Brown*, must already have been filed, or they have prescribed. Additionally, if Brown is given only a limited retroactive application to January 1, 1975, the effective date of the 1974 Louisiana Constitution, the effects of the decision on co-heirs and third parties will be further minimized. Thus the combined effect of a limited retroactive application and the above statutory provisions, is to make it the rare case in which land titles will be upset.[7]

Therefore, in weighing the possible inequities of retroactive application against the need to recognize and vindicate the illegitimate's constitutional rights, it appears that a limited retroactive application of *Succession of Brown* to the effective date of the new Constitution, January 1, 1975, best strikes the balance between these competing interests.

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7. Another fact worth noting, although not dispositive, is that knowledgeable attorneys handling successions have been elert to the possible rights of non-legitimates, and have, accordingly, required that affidavits of death and heirship in successions exclude the existence of non-legitimate children. Chiefly, they were alerted by the 1959 decision of this Court in *Henry v. Jean*, 238 La. 314, 115 So.2d 363 (1959). That case dealt with a 1944 amendment to La.C.C. art. 198, which provided an additional method of legitimating children, and its effect on a child's status as related to heirship. The amendment provided that a child could be legitimated by the subsequent marriage of his parents whenever the child had been either formally or informally acknowledged by them. Prior to the amendment a child could only be legitimated if formally acknowledged either before the subsequent marriage of his parents or in the marriage contract itself. The facts in the case involved a situation where the parents had married in 1900. The father had died in 1939 and the mother died after the 1944 amendment, in 1949. The illegitimate child was successful in arguing that he was legitimated by the 1944 amendment to La.C.C. art. 198, notwithstanding that his father had died prior to the amendment, and was entitled to share in ris mother's succession as a legitimate child.

such a far reaching retroactive application is not constitutionally required and may very well be constitutionally prohibited. Finding merit in this argument, we likewise renounce that holding.

As pointed out in Justice Dennis' dissent to our original opinion, the constitutionality of La.C.C. art. 919 was expressly upheld by the United States Supreme Court in 1971 in *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). Thus, clearly, prior to the date of that opinion, as well as for a time thereafter, the contrary holding of *Succession of Brown* was not foreshadowed.[9] Thus the first prong of the *Lovell-Chevron* test is not met insofar as a retroactive application of *Brown* prior to 1971 is concerned.

The second and third prong of the *Lovell-Chevron* test essentially require a weighing of the purpose and effect of the decision and its furtherance or retardation by retrospective application, against the inequities which may be imposed by retroactive application. Applying *Brown* only prospectively seriously retards rather than furthers the purpose of the decision, whicch is to vindicate the constitutional rights of illegitimates, although it fully avoids inequities to those who may be affected by a retroactive application. Conversely, applying *Brown* retroactively without limit fully vindicates the constitutional rights of the illegitimates, but it gives full sway to potential inequities as concern parties who may have inherited or otherwise acquired property prior to *Brown*. We thus find that the balance between the vindication and recognition of illegitimates' constitutional rights, on the one hand, and the

9. While it has been argued that *Labine v. Vincent, supra,* was incorrect, it was nonetheless a decision of the United States Supreme Court, interpreting the United States Constitution's equal protection clause. *Labine v. Vincent* had the force of law. It should be noted also that even when the Court rendered what has been viewed as a contrary decision in *Trimble v. Gordon, supra,* it expressly did not overrule *Labine v. Vincent.* Thus, although perhaps an erroneous decision, *Labine v. Vincent* was a binding one.

state's interest in the stability of land titles and preventing prejudice or inequities to gratuitous and onerous acquirers of property, on the other hand, is better struck by a limited retroactive application of the *Brown* decision to January 1, 1975, the effective date of the new Constitution, and no further.

Additionally, as relates to applying *Brown* retroactively without limit, there is a serious constitutional argument that property rights acquired through inheritance (or otherwise) prior to the opinion in *Labine v. Vincent*, which specifically upheld the constitutionality of La.C.C. art. 919, vested with the rendition of that opinion in 1971, and that the divesting ofthose rights is unconstitutional.

A third argument on rehearing which concerned this Court was the potential effect of our original opinion in carving out an exception for "third parties." It was not clear from our original opinion whether only those who acquired by onerous title were included in that appellation or whether some who took by gratuitous title might also be included. It has also been pointed out that the original opinion did not address the problem of whether the illegitimate, who did not have an action against a "third party" would nevertheless have an action against the heir who sold the property for all or a portion of the proceeds from the sale. These concerns are well taken. Such an exception carved out for "third parties" is likely to foster litigation over the problems noted above and extend rather than settle the disrupting effect on land titles.

Thus, in our judgment, the above discussed regarding ouroriginal opinion outweigh other arguments which support an unlimited retroactive retroactive application of the *Brown* decision with exceptions for testate successions and "third parties."

Therefore, after considering all the factors in determining whether *Succession of Brown* should not be applied retroactively, we find that the balance between all such factors is best struck by a limited retroactive application of the decision to the effective date of the 1974 Louisiana Consttution, January 1, 1975. Although there will be no exception for either third parties or testate successions in our holding, we nonetheless believe that with the statutory limitations imposed by La.C.C. art. 209 and La.R.S. 9:5630 any disruption in land titles whicch might result will be minor in scope. Thus, on balance, and guided by the *Lovell-Chevron* principles (foreshadowing, resulting retardation of the operation of the rule, inequities, etc.) a limited retroactive application of *Succession of Brown* to January 1, 1975 is, we determine, the preferable determination.

Were we in this case not to decide the retroactivity issue as we have, there would nevertheless be no plausible support for not applying *Succession of Brown* retroactively to the date of the rendition of the United States Supreme Court decision in *Trimble v. Gordon, supra.*

That decision even more than foreshadowed the result in *Succession of Brown.* It *dictated* the *Brown* holding. *Trimble* did not specifically declare La.C.C. art. 919 unconstitutional, but only because it dealt with an Illinois statute instead of our own. (The two statutes are very similar and only differ in that the Illinois statute designates the specific persons who are entitled to inherit whereas our statute dictates an order of succession. Nevertheless, both discriminate against illegitimate children.) And while *Trimble* did not expressly overrule *Labine v. Vincent, supra* (which upheld the constitutionality of La.C.C. art. 919 against an equal protection attack), it effectively did so by overruling the Labine stan-

dard of scrutiny and replacing it with a more stringent one.[10] *See*, Comment, *Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights*, 39 La.L.Rev. 1132 (1979).

Furthermore, no other state of which we are aware, has applied *Trimble v. Gordon*, in a succession case, from a point later than *Trimble's* rendition date. *Ford v. King*, 268 Ark. 128, 594 S.W.2d 227 (1980); *Stewart v. Smith*, 269 Ark. 363, 601 S.W. 837 (1980); *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1979); *In Re Rudder's Estate*, 78 Ill. App.3d 517, 34 Ill. Dec. 100, 397 N.E.2d 556 (1979); *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977); *Murray v. Murray*, 564 S.W.2d 5 (Ky. 1978); *Matter of Sharp's Estate*, 151 N.J. Super. 579, b77 A.2d 730 (1977); *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1979); *Winn v. Lackey*, 618 S.W.2. 910 (Tex.Civ. App. 1981). Therefore, even were we not to find the date of the 1974 Louisiana Constitution controlling, a retroactive application of *Brown* back to the date *Trimble v. Gordon* was rendered, would be necessary.

For all the above reasons, we conclude that *Succession of Brown's* declaration of unconstitutionality of La.C.C. art. 919 is retroactive to January 1, 1975, the effective date of the 1974 Louisiana Constitution.

[5] That being the case, the petition of Dorothy Clivens Vantress, whose father died on September 24, 1971 and as to whom our holding of limited retroactive application of *Suc-*

10. Applying *Succession of Brown* retroactively at least to April 26, 1977, the date of the rendition of *Trimble v. Gordon*, surely would come as no surprise to anyone. In the October 1977 issue of *The Louisiana Estate Planner*, Professor Gerald LeVan, while noting that Succession of Robins and the 1974 Louisiana Constitutional provision may well "point the way" for the Louisiana Supreme Court's setting the effective date for the application of *Trimble v. Gordon*, observed that the effective date for applying *Trimble* "could be no earlier than April 26, 1977, the date *Trimble* was decided."

Succession of Sidney BROWN, Jr.

No. 67211.

Supreme Court of Louisiana.

Sept. 3, 1980.
Rehearing Denied Oct. 24, 1980.

Acknowledged illegitimate children of decedent, who died intestate, brought suit to annul a judgment of possession recognizing legitimate child as sole heir of decedent. The First Judicial District Court ruled against illegitimate children, the Court of Appeal reversed and remanded, and a writ of certiorari was granted. The Supreme Court, Blanche, J., held that the statute which excludes acknowledged illegitimates from participating in the succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or a surviving spouse was unconstitutional on the basis of federal and state equal protection, in that the distinction drawn by the statute between acknowledged illegitimates and all other relations of decedent was arbitrary, capricious, and unreasonable, and there was no legislative authority to remedy the loss of succession rights by illegitimates as the children of their father.

Affirmed.

Marcus, J., dissented and assigned reasons.

Watson, J., dissented and assigned reasons.

1. Constitutional Law 225.1

To uphold constitutionality of statute excluding acknowledged illegitimates from participating in succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or a surviving spouse, under equal protection analysis, it must be shown that classification is

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Jonathan C. Harris, Baton Rouge, amicus curiae.

BLANCHE, Justice.

Sidney Brown, Jr. died intestate on January 1, 1978 in Shreveport, Louisiana. He is survived by four acknowledged illegitimate children, respondents, and one adopted child, relator. Relator had also been an illegitimate until her adoption in 1965, which gave her the status of a legitimate child. The decedent was married two times. His first wife died in 1955 and there were no progeny of his marriage. His second marriage ended in divorce in 1963 and, likewise, there were no progeny of this marriage. The decedent left a net estate valued at $4800.

Respondents, Ruby Atkins, Betty Jean Lee, Nathaniel Brown and Eugene Brown, sued to annul a judgment of possession recognizing the relator, Effie Brown, as the sole heir of the decedent. The First Judicial District Coure ruled against the respondents' request. In an excellent and comprehensive opinion, the Second Circuit Court of Appeal reversed and remanded the case to the trial court for an accounting by the relator and the execution of a new judgment of possession recognizing the respondents as the lawful heirs of Sidney Brown, Jr., along with the relator. We affirm.

At issue is the constitutionality of article 919 of the Louisiana Civil Code. We take jurisdiction to decide this constitutional matter on the basis of the 1974 Louisiana Constitution, art. 5, § 5(D). We declare C.C. art. 919 to be uncon-

"substantially related" to permissible state interests. U.S.A. Const. Amend. 14; LSA-Const. Art. 1, § 3; LSA-C.C. art. 919.

2. Constitutional Law 225.1
Illegitimate Children 82

Fact that father could have left a will, or legitimated, or even adopted illegitimates, did not serve as a sufficient state interest so as to constitutionally clothe statute excluding acknowledged illegitimates from participating in succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or surviving spouse. U.S.C.A. Const. Amend. 14; LSA-Const. Art. 1, § 3; LSA-C.C. art. 919.

3. Constitutional Law 225.1

State interest of stable land titles and orderly disposition of property, advocated in support of statute excluding illegitimates from inheritance, will withstand an equal protection analysis if statute provides illegitimates some way to obtain equal protection. U.S.C.A.Const. Amend. 14; LSA-Const. Art. 1, § 3; LSA-C.C. art. 919.

4. Constitutional Law 225.1
Illegitimate Children 82

Statute excluding acknowledged illegitimates from participating in succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or surviving spouse was unconstitutional on the basis of federal and state equal protection, in that distinction drawn by statute between acknowledged illegitimates and all other relations of decedent was arbitrary, capricious, and unreasonable, and there was no legislative authority to remedy loss of succession rights by illegitimates as children of their father. U.S.C.A. Const. Amend. 14; LSA-Const. Art. 1 § 3; LSA-C.C. art. 919.

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stitutional on the basis of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and art. 1, § 3 of the 1974 Louisiana Constitution.

Article 919 excludes acknowledged illegitimates from participating in the succession of their father when he is survived by legitimate descendants, ascendants, collateral relatives, or a surviving spouse. The trial court, following the letter of the statute, excluded the respondents because of the existence of the relator as a legitimate child of their father.

[1] To uphold the constitutionality of art. 919 under an equal protection analysis, it must be shown that the classification is "substantially related" to permissible state interests, *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, L.Ed.2d 503 (1978). Under this same standard, the United States Supreme Court earlier decided, in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 1459 (1977), that an Illinois statute discriminating against an illegitimate in inheriting from his father was unconstitutional.

Previously, the United States Supreme Court held that art. 919 was constitutional, *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). However, at that time, the Court used a test of "minimum rationality" under the old scheme of equal protection analysis, *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). The two tier approach of *Dukes* has been refined to allow for a middle level of analysis for statutes based on such categories as sex, *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); birth, *Matthews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); and illegitimates, *Lalli*, supra, and *Trimble*, supra.

Though *Trimble* does not expressly overrule *Labine*, it

possibilities as to how the father could have insured the illegitimates a part of the succession are mere hypotheses which will not clear the statute of its underlying invalidity. The idea that the father could have left a will, or legitimated, or even adopted the illegitimates does not serve as a sufficient state interest so as to constitutionally clothe art. 919. The acknowledged illegitimate has no recourse to force his father to leave a will, to legitimate, or to adopt him. The point is, the father did not pursue any of the above possibilities, and the acknowledged illegitimates' rights should not hinge on mere hypotheses of what the father might have done.

The only remaining rationale from *Labine* left valid after *Trimble* is the state's interest in the orderly disposition of property at death. *Lalli*, 99 S.Ct. pp. 524-5, reemphasized this valid state interest; however, *Trimble* recognized this important interest is not unquestionable, but must yield in the fact of constitutional mandates.

[3] The state interest of stable land titles and orderly disposition of property will withstand an equal protection analysis, if the state statute provides the illegitimate some way to obtain equal protection, *Lalli*. In *Lalli*, the Court upheld a New York statute which required the illegitimate to have his parental filiation declared by a competent court before his father's death in order to share in the inheritance.

[4] The requirement of a filiation order during the lifetime of the father was held to be substantially related to the important state interests and, therefore, the statute passed constitutional equal protection muster. Problems such as proof of paternity, service of process, finality of decrees in estate distribution, and spurious claims were all recognized in *Lalli*, pp. 525-6, and the New York statute requiring proof of filiation before death cured them. Louisiana could, likewise,

anticipate and solve these problems with a statute that allows the acknowledged illegitimate to relieve his predicament rather than relying upon present art. 919, which flatly denies him succession rights if other relatives exist.[1]

Article 919 likewise violates art. 1, § of the 1974 Louisiana Constitution, which states:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, briefs or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

The members of the constitutional convention intended this article to include within its scope unreasonable discrimination based upon illegitimacy, *Succession of Thompson*, 367 So.2d 798 (La. 1979).

The distinction drawn by art. 919 between these acknowledged illegitimates and all other relations of the decedent is arbitrary, capricious, and unreasonable. This conclusion is not a recent development, for it is but a further extension of a line of judicial determinations striking down Louisiana laws which discriminate unconstitutionally against illegitimates.

Three times the United States Supreme Court has invalidated Louisiana statutes because of their denial of equal protection rights to illegitimates. *Levy v. La.*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); *Weber v. Aetna Casualty*

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1. See the proposed guidelines suggested by Professor H. Alston Johnson in his Report to the Louisiana State Law Institute (Revision of the Louisiana Civil Code of 1980, Book III, Titles I and II, Succession and Donations, December 7, 1979).

& Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); and *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968). Using art. 1, § 3 of the 1974 Louisiana Constitution, this Court has found unconstitutional certain testate codal provisions which discriminate against illegitimates, *Succession of Robins*, 349 So.2d 276 (La. 1977).

Thus, both the United States and Louisiana Constitutions prohibit the total denial of inheritance rights of acknowledged illegitimates in the succession of the father who is survived by other relations. From our examination of art. 919, it is aparent that the respondents are being discriminated against because of their birth status, for had they been born legitimate, or made legitimate as the relator was, they would have succeeded with the relator to their father's succession. Absent any legislative authority to remedy their loss of succession rights as the children of their father, we find the statute denies them the equal protection of the law.

For the above reasons, art. 919 is declared unconstitutional and the decision of the Second Circuit Court of Appeal is affirmed.

MARCUS and WATSON, JJ., dissent and assign reasons.

MARCUS, Justice (dissenting).

While it is true that both the federal and state constitutions prohibit the total denial of inheritance rights of acknowledged illegitimates in the succession of the father who is survived by other relations, art. 919 does not prohibit these rights as it is applicable only to intestate successions. In *Lalli*, the United States Supreme Court held that a state does have a legitimate interest in the orderly disposition of pro-

the majority. The stability of land titles, the just and orderly disposition of property at death, and the dangers of the " 'secret illegitimate' " (*Lalli*, 99 S.Ct. 526) are so important that this court should not strike down the historical forced heirship system of Louisiana.

Therefore, I respectfully dissent.

forecasts the proper analysis on a more critical examination of the statute:

> "Despite these differences it is apparent that we have examined the Illinois statute more critically than the court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine*, the more recent analysis controls." *Trimble*, 97 S.Ct. 1468, n. 17.

Under this analysis, the classification set forth in art. 919 must be substantially related to permissible state interests.

The three state interests advocated are the promotion of legitimate family relationships, the possibilities which the father could have exercised to insure the illegitimates a part of the succession, and the orderly disposition of property at death. The first two interests were specifically rejected in *Trimble*. The third was the major reason for the upholding of the New York statute's constitutionality in *Lalli* and will be discussed in greater detail here.

Trimble rejected as proper justification for a statute which discriminates against illegitimates the promotion of legitimate family relationships accepted in *Labine* by "only the most perfunctory analysis", *Trimble*, p. 1464. This "family harmony" state interest is even weaker in this case. The decedent had five illegitimate children, none of them the progeny of his two marriages. Four were openly acknowledged and one was adopted, so that the existence of all five was equally known and no threat to any family harmony even existed. Even if it had, the *Trimble* Court expressly rejected the argument that a state may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships, *Trimble*, pp. 1464-5. We agree that the innocent children should not suffer from the promiscuous adventures of their parents.

[2] *Trimble*, pp. 1466-7, also made clear that the *Labine*

perty at death. Thus, the law does not mandate that art. 919 be declared unconstitutional. Accordingly, I respectfully dissent.

WATSON, Justice, dissenting.

Faced with an appealing factual situation, the majority has chosen to call acknowledged illegitimates to the intestate succession of their father, despite a legitimate forced heir. Although the relator, Effie Brown, was an illegitimate until her adoption, she now enjoys legitimate status in the eyes of the law. The respondents, unfortunately, were never adopted and have the status of illegitimacy, but will share equally with the forced heir.

The majority relies on the United States Supreme Court cases of *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 1459 (1977) and *Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503. These cases differ on the facts with the instant case. In *Trimble* the illegitimate was claiming against ascendants and siblings of the deceased, not against a legitimate child. In *Lalli* the illegitimate was claiming against the father's legal widow. It is true that in *Trimble*, the United States Supreme Court declared unconstitutional a certain provision of Illinois law which prevented the illegitimate child from inheriting. However, in *Lalli* the opposite result was reached; the illegitimate was denied inheritance rights. Since New York law provides that an illegitimate, during the lifetime of the father, can achieve rights of inheritance, through judicial proceedings, this was held sufficient to accord equal protection. The justices of the United States Supreme Court differ among themselves as to the effect of *Lalli* on *Trimble*. (See concurring opinion of Blackman, J., 99 S.Ct. 529.)

Trimble and *Lalli* do not require the result reached by